In the Supreme Court of the United States,

OLD COLONY TRUST COMPANY, Appellant, v. THE CITY OF OMAHA, Appellee.	Motion that cause be advanced and heard together with case No. 162.

Now comes Old Colony Trust Company, appellant herein, and moves the Court that the above entitled cause be advanced and that it be heard together with the cause entitled Omaha Electric Light and Power Company appellant v. The City of Omaha *et al.* appellees, being cause Number 162 on the docket of this Court for the October 1912 term.

This motion is based upon the records and files in said causes on file in this court.

The grounds of this motion are (1) that said causes involve the same question, viz.: the existence and extent of the franchise of the Omaha Electric Light and Power Company in the City of Omaha; and, (2), that said question is of great public importance and in the interest of the public should be decided at an early date; and, (3), the record in this cause contains testimony disclosing important facts relating to the question involved, which are not found in the record in said cause number 162, and it is important that this Court have all of the essential facts, bearing upon the question, before it when it decides the same.

WILLIAM D. MCHUGH,
Counsel for Old Colony Trust Company Appellant.

Suggestions in Support of Motion.

Both cases involve the question of the existence and extent of the franchise rights of the Omaha Electric Light and Power Company in the streets of the City of Omaha.

Case 162 is a suit brought by the Omaha Electric Light and Power Company against the City of Omaha to restrain the city and its officials from carrying out a resolution directing that certain wires of said Company, carrying electric current to be used for power purposes, be cut by the City Electrician.

This case Number 754 is a case brought by Old Colony Trust Company, Trustee for the bondholders under a mortgage executed by the Omaha Electric Light and Power Company against the City of Omaha to restrain the carrying out of the same resolution.

The franchise rights of said Omaha Electric Light and Power Company were mortgaged to the Old Colony Trust Company and are an essential part of the security of the bondholders.

This action was begun by the Trustee under the mortgage because important facts bearing directly upon the existence and extent of said franchise rights were not presented in the record of the suit Number 162 brought by the Company, and hence this suit was necessary to preserve the rights of the bondholders.

The records in both cases are printed.

Briefs in both cases can be filed and served in accordance with the rules and practice of this court.

The Omaha Electric Light and Power Company consents to having both cases heard together and a stipulation consenting thereto is on file herein.

The City of Omaha, which alone objects to the order prayed for, is defendant in both cases and cannot be prejudiced by arguing both cases at the same hearing.

It is in the interest of justice that both cases be heard together in order that, in considering the question of the existence and extent of said franchise rights, this court may have before it all the facts which relate to the question. Even though the evidence in the later case may not be considered

in the earlier case, yet the decision as to whether final decree be ordered in the earlier case or the case be remanded may be affected by the court's knowledge of all the facts.

There is a pending motion in the earlier case, Number 162, to dismiss the appeal upon the ground of want of jurisdiction. This motion is to be taken up with the hearing on the merits. If this motion should be sustained it is important that the later case be heard at the same time, for this reason: a temporary injunction was issued in the earlier case which is still in force. Should the appeal be dismissed this injunction would be dissolved since the action would be finally dismissed.

No injunction was issued in the later case because the previous injunction made it unnecessary and improper. But should the injunction in the earlier case be dissolved, it would be incumbent upon the appellant in the later case to apply to this court for an injunction in this case. The necessity for such an application in this case, to this Court, would be avoided by advancing this case and ordering it to be heard with the earlier case.

Respectfully submitted,

WILLIAM D. MCHUGH,

Counsel for Old Colony Trust Company,

Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 754.

OLD COLONY TRUST COMPANY, APPELLANT,

v.

THE CITY OF OMAHA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This suit was begun by the Old Colony Trust Company, Trustee under a mortgage executed by the Omaha Electric Light & Power Company, to enjoin the City of Omaha and its officials from enforcing a resolution adopted by the City Council of the City of Omaha, and approved by the Mayor, directing the city electrician to cut the wires of the Omaha Electric Light & Power Company which carried electric current to be used for heat or power purposes. The District Court dismissed the suit for want of equity, upon the ground that the case was controlled and ruled by the decision of the Court of Appeals for the Eighth Circuit in the case of Omaha Electric Light & Power Company against the City of Omaha. The case was then taken, by appeal, to this court.

The facts, as they appear from the record in the cause, are as follows:

Although prior to 1884, the commercial use of electricity was not so general as it has since become, yet for years prior to said date, the adaptability of electricity to commercial uses was well known. And in the larger cities of the United States, electric energy was in actual use for the production of light, power and heat, and for other commercial purposes. The manner in which these uses were made available to the public was by the generation of electricity in some central plant in each community, and the distribution of the electric current, by means of wires, throughout the community, thereby delivering such electric current at the premises of each consumer. In many of the larger cities of the United States, there had been organized and established, prior to 1884, companies whose business it was to generate electricity at a central plant in the city, and to distribute the said electric current, by wires, throughout such city to the premises of the consumer thereof, and such current was used by each consumer, on his own premises, in the production of light, power or heat, or for such other purpose as he desired. Such companies, except as by contract they operated lights for street lighting, did not furnish light to consumers; the companies furnished merely the electric current at the premises of the consumer. The consumer utilized the energy as he desired, sometimes producing light, sometimes power and sometimes using the energy for other purposes. As the great and predominant use made of the electric current, furnished by the companies mentioned, was for the production of light, the companies themselves became generally known as electric light companies, and the business carried on by said companies became and was generally known as the electric light business.

In December, 1884, the City of Omaha, by ordinance, granted to the New Omaha-Thomson-Houston Electric Light Company, or assigns, without limit as to time, a right of way through, upon and over the streets, alleys and public grounds of the City of Omaha, for the erection and maintenance of poles and wires with all the appurtenances thereto, for the purpose of transacting a "general electric light business."

The Supreme Court of Nebraska decided (prior to the time our rights as owners of bonds attached) that, by the terms of such an ordinance, there was vested in the grantee, in perpetuity, a right of way over all the public ways mentioned; and decided, also, that cities, with charter powers sim-

ilar to those possessed by the City of Omaha in 1884, were expressly authorized to grant such rights in perpetuity. This is the settled law of Nebraska, evidenced by a series of decisions hereinafter referred to.

The grant by the ordinance was, as was said, without limit as to time; it was not limited to the New Omaha-Thomson-Houston Company, but the grant was to this company "or assigns." The New Omaha-Thomson-Houston Company was not organized when this ordinance was passed, and it was not known to the city officials whether the company would be organized under the laws of Nebraska or some other state, or what would be the corporate life of the company.

The ordinance granting this right of way, is as follows:

Ordinance No. 826.

"An Ordinance granting the right of way to the New Omaha-Thomson-Houston Electric Light Company and regulating the same, and prescribing penalties for the violation of this ordinance.

Be It Ordained by the City Council of the City of Omaha:

Section 1. That the New Omaha-Thomson-Houston Electric Light Company, or assigns, is hereby granted the right of way for erection and maintenance of poles and wires, with all the appurtenances thereto, for the purpose of transacting general electric light business through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance, Provided, that said Company shall at all times, when so requested by the city authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires that may be necessary for the use of the fire department or police of the city; and provided further, such poles and wires shall be erected so as not to interfere with the ordinary travel through such streets and alleys; and provided, that whenever it shall be necessary for any person to move along or across any of said streets or alleys any vehicle or structure of such height or size as to interfere with any of the wires so erected, the company operating such poles and wires shall, upon receiving

twelve (12) hours' notice thereof temporarily remove said poles and wires from such place as must necessarily be crossed by such vehicle or structure, and provided further, that whenever the City Council shall, by ordinance, declare the necessity of removing from the public streets and alleys of the City of Omaha the telegraph, telephone or electric poles or wires thereon constructed or existing, said company shall, within sixty (60) days from the passage of such ordinance remove all poles and wires from such streets and alleys by it constructed, used or operated.

Section 2. Any person who shall interfere, cut, injure, remove, break or destroy any of the poles, wires, fixtures, instruments or other property of the New Omaha-Thomson-Houston Electric Light Company, or assigns, within the corporate limits of this city, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding One Hundred Dollars.

Section 3. This ordinance shall take effect and be in force from and after its passage.

After the incorporation of the said New Omaha-Thomson-Houston Electric Light Company, it duly accepted the said ordinance and did, at large expense, construct and put in operation, in said City of Omaha, a central generating station, and a distributing system, and thereby placed itself in position to supply electric current to all patrons, the same to be used for light, power, heat or any other commercial purpose for which the same was adapted. This generating plant and distributing system was constructed and installed and operated, as hereinafter mentioned, under the ordinance aforesaid. The said plant and distributing system was operated by the New Omaha-Thomson-Houston Company until July, 1903, when the plant and all the rights of said company were sold to the Omaha Electric Light & Power Company. Immediately upon the construction of its said plant, the said New Omaha-Thomson-Houston Electric Light Company by public advertisement and solicitation, held itself out as engaged in the business of generating and distributing to patrons electric current for use by them in the production of light, power, heat or for such other purpose as the same was available. And during all the years since then, the New

Omaha-Thomson-Houston Electric Light Company and its assign have operated the said generating plant and distributing system in the City of Omaha, and in the streets, alleys and public places thereof, under and agreeably to the terms and conditions of the said ordinance; and during all the period since the construction and installation of the said plant, the said company and its assign have been engaged, continuously, in the business of generating and distributing, by means of said plant and system, electric current to the said City of Omaha, and to private and individual consumers thereof, and the said current has been utilized by said city and consumers for the production of light, heat and power and for other commercial purposes. This generating plant and distributing system have been constantly enlarged and improved. Said Omaha Electric Light & Power Company today generates in said plant and distributes through its system, electric current used for the production of light, heat and power and for other purposes, not only throughout the City of Omaha, but also throughout the adjoining communities of South Omaha, Florence, Bellevue, Dundee and other places. Large sums of money have been invested from time to time in appliances necessary to enable the said plant to meet the demands for electric current to be used for the production of light, heat, power and other purposes in the City of Omaha and the surrounding territory.

The use, for power purposes, of the electric current generated and distributed by said company was, at first, very limited; but it has constantly increased from year to year, until now more than one-fifth of the entire electric energy generated and distributed by said plant is utilized by consumers in the production of power. So extensive has this use become, through its gradual development in Omaha, that, with the exception of the very largest and heaviest manufacturing plants, all the factories, grain elevators, printing establishments and other lines of business using machinery, are operated entirely by electric power, and these plants, factories and appliances have been adjusted and adapted to the utilization of electric energy, furnished by said company, as a motive power.

Thus the generating plant and distributing system constructed and maintained in the City of Omaha and throughout its streets, alleys and public places, under and agreeably

to said ordinance, has been constantly and uninterruptedly utilized in the generation and distribution of electric energy, which energy has been continuously used in constantly increasing proportions in the production of power as well as in the production of light and heat and for other commercial purposes. All of which was, of course, at all times, known to the City of Omaha and its officials.

Moreover, during all the years that this plant has been operated in the City of Omaha, the city and the company, in carrying out the said ordinance, have uniformly placed upon it a practical construction to the effect that the term "general electric light business" embraced the function of generation and distribution of electric energy to be utilized for light, heat, power and other available purposes.

By a series of ordinances, the City of Omaha regulated the installation, insulation and connections of all wires carrying electric current to be utilized for power purposes, and required the same to be made under the supervision of, and upon the permit of the city electrician. Under these ordinances, thousands of connections with the wires of said company were so made, and reports thereof submitted by the city electrician to the City Council. The city, by ordinance, required wires carrying electric current for light, heat and power purposes, to be placed under ground, within certain districts of the city, which ordinances were obeyed by the company. The city contracted with the company for the lighting of its streets, the contract containing a provision that a royalty of three per cent of the gross receipts of the company, from light and power purposes, should be paid to the city; and these payments were made. The city is one of the customers of the electric light company, not only for electricity to be used for lighting, but also for electric energy to be utilized for power purposes. The city has, for some years, operated various plants in which machinery is used, and the motive power for such machinery, is electric energy generated and supplied from the plant in question. The city made application to the company for the service of electric energy to be used for power purposes, in specific instances; the connections were made and the services rendered and paid for by the city.

By this uniform and constant course of conduct on the part of the city and the company, acting under the ordinance

in question, there has been placed upon the ordinance the practical construction as above stated.

By the long course of dealing above mentioned, whereby the City of Omaha encouraged the company to the expenditure of large sums of money in the belief that the ordinance in question granted to it the right to use the streets for the transmission of electric energy to be used for power and heat, as well as light, and by which course of conduct the manufacturers of the City of Omaha and the business community generally have been encouraged to abandon steam plants as the motive power, and to adjust, at large expense, their plants and machines for the use of electricity as the motive power, the city is estopped to deny that the company has the right to use the streets to carry current to be used for power purposes, to the extent they were so used when the resolution hereinafter mentioned was adopted; and such is, and for years has been, the settled law of the State of Nebraska, as declared by its Supreme Court in cases hereinafter referred to.

In 1903, the Omaha Electric Light and Power Company executed a mortgage to the Old Colony Trust Company, as Trustee, upon all of its property, franchises and rights, including the rights and franchises granted by ordinance No. 826 aforesaid. The mortgage was to secure bonds up to three million dollars. Bonds amounting to more than a million dollars were first issued and were purchased jointly by Perry, Coffin & Burr and by N. W. Harris & Company. Before purchasing these bonds, the two bond houses took the opinion of their counsel as to the nature and extent of the franchise rights of said Omaha Company under the ordinance in question. The counsel advised that the franchise right was unlimited in time, and satisfactory from a business standpoint. This was, as was said, in accordance with decisions theretofore rendered by the Supreme Court of Nebraska, wherein similar ordinances were held to grant the right of way in perpetuity, and that cities in Nebraska, had, under their charters, express power to make such grants in perpetuity.

Relying upon this opinion, the bond houses named purchased the first issue of bonds exceeding one million dollars. Subsequently, they purchased other issues, until there are now outstanding, more than two million dollars in bonds secured by the mortgage mentioned.

As we have said, from the time of the installation of its plant in Omaha, under the said ordinance, the New Omaha-

Thomson-Houston Electric Light Company and its assign, with the knowledge, approval and co-operation of the City of Omaha, constantly asserted and exercised its right to occupy, with its poles and wires, the streets of the City of Omaha for the transmission of electric energy to be utilized for light, heat, power and other purposes. These facts were known to, and relied upon by the purchasers of said bonds. This right was never questioned by the City of Omaha, until 1908. On the 26th day of May of that year, the City of Omaha passed and approved a concurrent resolution, as follows:

> "Concurrent Resolution No. 2330.
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> "Resolved, by the City Council of the City of Omaha, the Mayor concurring that the City Electrician be and he is hereby ordered and directed to disconnect, or cause to be disconnected on or before July 1st, 1908, all wires leading from the conduits or poles of the Omaha Electric Light and Power Company transmitting electricity to private persons or premises to be used for heat or power; and to take such steps as may be necessary to prevent the said Omaha Electric Light and Power Company from furnishing or transmitting from the conduits or wires electricity to private persons or premises for heat or power purposes; and be it further resolved by the City Council of the City of Omaha, the Mayor concurring, that the Electrician be and is hereby ordered and directed to remove or cause to be removed on or before July 1st, 1908, all conduits, wires and poles belonging to the Omaha and Council Bluffs Street Railway Company and located in, under, upon or over, any street, alley, thoroughfare, or public place of the City of Omaha and maintained and used by said Street Railway Company for furnishing or transmitting electricity to private parties or premises for light, heat or power purposes."

The City of Omaha assumes to justify the passage and enforcement of said resolution upon two grounds.

Its first claim is that the grant of the right of way by said ordinance was limited to the corporate life of the New Omaha-Thomson-Houston Electric Light Company which was

twenty years; and, said period having expired, the present company has no right to occupy the streets of Omaha with its poles, for any purpose.

Its second claim is that the grant of the right of way for the transaction of a "general electric light business" did and does not give the right to use the streets for the transmission of electric energy to be used for power or heat purposes.

As the city was intending to enforce the said resolution, the Omaha Electric Light & Power Company instituted a suit in the Circuit Court of the United States, for the District of Nebraska, to procure a perpetual injunction restraining the threatened action of the city. A temporary injunction was issued as prayed. Upon final hearing, the Circuit Court entered a decree dismissing the suit for want of equity, holding that, under the ordinance aforesaid, the company was not granted the right to use the streets to carry electric current to be used for power purposes. (172 Fed. 494.) The case was taken by appeal to the United States Circuit Court of Appeals for the Eighth Circuit. That court entered a decree affirming the decree of dismissal, holding that the franchise rights of the company under said ordinance had expired prior to the passage of the resolution, and that the company has no right to occupy the streets of the City of Omaha for any purpose. (179 Fed. 455.) From this decree, an appeal has been taken, by the company, to this court, and said cause is now number 162 upon the docket of this court, for the present term, and the same is to be argued in connection with this case.

When the decision of the courts in the last mentioned cause was announced, the bonds, secured by the mortgage aforesaid, which had theretofore been recognized as a safe and good investment and which readily sold at more than par, ceased to have any market; they were taken off of the circulars whereon saleable bonds are listed, and an owner desiring to sell the bonds, could find no purchaser; and no sales have been in fact made, except in a very few instances wherein a small number of the bonds have been sold, the purchaser taking them as a speculation, attracted by the price of 90c at which the particular bonds were offered. Finding the bondholders in this position, with the saleable quality of their bonds practically at an end, and recognizing that the franchise rights aforesaid, which are held by the trustee under the mortgage as security for the bonds, constituted an

essential element in such security, the trustee under the mortgage began this action, in the Circuit Court of the United States, to protect the security aforesaid by obtaining an injunction to restrain the city from enforcing the said resolution. In this action, in addition to the matters presented in the suit of the Omaha Electric Light & Power Company, above mentioned, other and important facts, bearing upon the questions to be decided, were presented both in the pleadings and in the proofs.

Upon the final hearing of this cause, the United States District Court felt constrained to dismiss the suit because of its opinion that it was controlled and ruled by the decision of the United States Court of Appeals in the other case. A decree dismissing the bill was thereupon entered. The Old Colony Trust Company, complainant, thereupon brought the case to this court by appeal. By order of this court, this cause has been advanced and is to be argued together with the above mentioned case number 162.

SPECIFICATION OF ERRORS.

The United States District Court for the District of Nebraska, which entered the decree of dismissal in this cause, erred as follows:

1. Said Court erred in finding that this cause was controlled or ruled by the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case entitled *Omaha Electric Light & Power Company v. the City of Omaha, et al.*, 179 Fed. 455.

2. The said Court erred in not decreeing that the Omaha Electric Light & Power Company had a right of way in perpetuity upon, over and through the streets, alleys and public places of the City of Omaha, for the purposes of distributing electric energy to the premises of the consumers thereof, the same to be utilized by such consumers, for the production of light, power, heat or other practicable purpose; and that the Old Colony Trust Company, as Trustee under the mortgage of said company, was entitled to have the said right enforced for the protection of the holders of the bonds secured by the mortgage, by a decree enjoining the City of Omaha and its officials from cutting wires of the said Company.

3. The said Court erred in entering a decree dismissing this cause for want of equity.

I.

By the ordinance in question, when accepted, there passed to the New Omaha-Thomson-Houston Electric Light Company or assigns, in perpetuity, the right of way through, upon and over the streets, alleys and public grounds of the City of Omaha, for the erection and maintenance of poles and wires with all appurtenances thereto, for the purpose of transacting a general electric light business.

Before entering upon the discussion of the question whether the grant under the ordinance was in perpetuity, it is well to state our conception of this expression and define what we mean by the term "in perpetuity", as applied to this grant.

While we contend that the grant of the right of way by the ordinance in question was of such right "in perpetuity", we do not claim that the right vested in the New Omaha-Thomson-Houston Electric Light Company or its assigns, was perpetual under all conditions and circumstances. The grant was not a gratuity, but, as a consideration therefor, carried an obligation on the part of the company acting under the same to render to the public the service to secure which the grant was made. No state in the Union has been more consistent than Nebraska in holding public service corporations to the full performance of the obligations assumed by said companies in accepting a grant, such as this, from a city.

A telephone company has been compelled by the courts to install in an office, a private telephone, although a public booth was within easy distance. *State, ex rel., v. Neb. Tel. Co.,* 17 Neb. 126. A water company has been compelled to supply individuals with water, notwithstanding the violation of a rule of the company, which the court held unreasonable. *Am. Water Works Co. v. State, ex rel.,* 46 Neb. 194-199. And in numerous other ways, the Nebraska Courts have held public service corporations strictly to the performance of the duties, the performance of which were the consideration for grants, by the public, of the use of the streets.

In *The American Water Works Company v. State,* 46 Neb. 194, the Court said:

> "The Water Company, though a private corporation, by virtue of the franchise granted it by the City of Omaha and its user of such franchise,

became affected with a public use. By accepting such franchise and entering upon the business of furnishing water to the city and its inhabitants it assumed a public duty. That duty was to furnish water at reasonable rates to all the inhabitants of the city and to charge each inhabitant of the city for water furnished the same price it charges every other inhabitant for a like service under the same or similar conditions. (*Williams v. Mutual Gas Co.*, 18 N. W. Rep. (Mich.), 236; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 526.) And we have no doubt but that the Water Company had and has the right to prescribe all such rules and regulations for its convenience and security as are reasonable and just, and to refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But such rules must be reasonable, just, lawful, and not discriminatory."

In *State v. S. C. & P. R. R.* 7 Neb. 374 and 376, the Court said:

"The location of the town of Blair caused the abandonment of the town of De Soto; the town site of Blair being much more eligible than that of De Soto, and its advantages for business, superior. But this furnishes no excuse to the railroad company for ceasing to operate its road or for taking up its tracks from Blair to De Soto. The conditions of the grant were that the road should be built and operated from De Soto to Fremont, and the fact that the operation of the road is unprofitable furnishes no excuse whatever for the failure to comply with the conditions of the grant, and the state may compel a compliance with the terms of the contract by mandamus or other appropriate remedy. If, as in this case, a portion of the line has become valueless by reason of the location of another line in its immediate vicinity, the legislature undoubtedly may, upon such terms as may be just, grant relief, provided it does not affect vested rights." * * * "The defendant, unless relieved by the legislature, must conform to

the terms and conditions of the grant, and the entire line must be kept in running order and operated."

This is, of course, the general rule of law.

In the *City of Potwin Place v. Topeka Ry. Co.*, 51 Kas. 609, the Court, in granting a mandamus to compel a street railway company to operate its road, said:

"By the provisions of the ordinance the Rapid Transit Company obtained the right to construct its roadway in the public streets, to maintain and operate it, to transport passengers and parcels by means of electric power, to collect charges and tolls therefor. These privileges were not granted to the company solely for the company's benefit, but rather that the citizens of the plaintiff city might have the benefit of an improved mode of travel—that they might enjoy the benefits of one of the inventions of the age. By the terms of the ordinance the rights of the company were defined and its duties to the public declared. The company accepted the provisions of the ordinance, and constructed its road under the leave thereby obtained. May it now disregard the obligations imposed on it by its terms? * * * Having accepted the rights and privileges conferred by the ordinance, we think the duty rests on them, in favor of the plaintiff city and its citizens, to render them the service for which the privilege was granted. While there may be some doubt as to whether this ordinance granted the Rapid Transit Company a franchise within the strict definition of the word, it is extremely difficult to perceive wherein the rights conferred substantially differ from a franchise derived immediately from the legislature. It is certainly a grant in the nature of a franchise, and one which imposes on the company duties toward the public. A street railway may be compelled by *mandamus* to perform these duties: See Booth on Street Railways, sec. 65 and authorities there cited. Whether the company's duties be denominated contract obligations, or duties imposed by the terms on which a franchise has been granted, the duties are essentially public."

See also *Fellows v. City of Los Angeles,* 151 Cal. 52.

It is clear, therefore, that the grant of the right of way in perpetuity, is not a mere gratuity, but carries with it, on acceptance, an obligation on the part of the company to perform its public duties. It is also well settled in Nebraska, as elsewhere, that if a public service company becomes invested with a grant of right of way such as this, in perpetuity, and thereafter fails in the performance of its duty to the public, and abandons its public function, the company thereby forfeits the grant of the right of way and, in any appropriate proceeding, the forfeiture may and will be judicially decreed. *Nebraska Telephone Co. v. City of Fremont,* 72 Neb. 25.

Thus the grant of the right of way, in perpetuity, by the ordinance in question, does not mean that under all circumstances, the company can remain in perpetual possession of the right of way, but, on the contrary, its possession and right may be terminated at any time upon the failure of the company to carry on the public service which is the consideration of the grant.

Moreover, the right of regulation exists in the public with respect to the business to be carried on under this ordinance. The right to impose reasonable rates for service and the right to make any and all regulations respecting the conduct of the business, which are essential and appropriate to secure the public health, the public morals or the public safety, is vested in the public. The police power is adequate to insure, in all respects, such an operation of the plant, under the ordinance, as is required by the health, morals and safety of the people.

In *New Orleans Gas Co. v. Louisiana Light Company,* 115 U. S. 650, speaking of a public service company using the streets of a city under a grant, and the power of regulation thereof, this court said (p. 672):

> "The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public

> health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons, or corporations."

We therefore mean, when we contend that the grant by the ordinance in question was of a right of way "in perpetuity", that, under the ordinance, the company has merely the right to occupy, for the purposes named, the streets, alleys and public places of the city in accordance with all proper and reasonable regulation provided by the state or its agencies, so long as it complies with the obligations imposed upon it by its acceptance of the grant to properly and adequately give, to the public, the service which it undertakes to render.

By the grant in question, under our construction, the City of Omaha surrendered no governmental function. In this respect, it differs from some grants which have been before the courts. When a city grants to a public service company the right to charge specific rates for its service, it follows that the right of the city to regulate and fix these rates is surrendered, and the governmental functions of the city thereby limited. A similar result may be said to follow the grant of an exclusive franchise, by a city, to a public service company.

But this grant is not exclusive; the city is still free to make a similar grant to another company. The city still remains, as we have shown, in full possession of all its governmental power regarding this company and its business, and can regulate the conduct of the business and the rates of charges of the company in every constitutional manner.

Moreover, the grant in question was not to further a merely private enterprise. The use of the streets to transport electric energy for light, heat or power purposes, is as much a public function as is the use of the streets to transmit information by telephone or telegraph or transmit persons by street railway. It is the public nature of the use of the street which explains and justifies the grant. To conceive the ordinance as in aid of a private enterprise, is to overlook, entirely, the essential nature of the grant. The learned judge who wrote the opinion of the Circuit Court of Appeals so conceived the ordinance. He speaks of the grant (179 Fed. at

page 459) as "The right to use the streets of the city forever, to inaugurate and promote a private enterprise." This misconception, of necessity, affected his point of view and formed the basis of his conclusion that the grant was for a period of twenty years only.

The circumstances attending the passage of the Ordinance in question, negative the idea that the grant of the right of way was for a limited term.

The Circuit Court of Appeals decided that, under the ordinance, the grant of the right of way was limited by the corporate life of the New Omaha-Thomson-Houston Electric Light Company, to-wit: twenty years. The court, however, ignored the controlling facts in connection with the ordinance.

In the first place, the grant was not limited to the New Omaha-Thomson-Houston Electric Light Company. On the contrary, the grant was to that company "or assigns." As the ordinance by express terms contemplated and provided for the right of the New Omaha-Thomson-Houston Electric Light Company to assign and transfer the grant of the right of way, it is clear that the corporate life of that company was not intended to measure the duration of the grant.

In the second place, the New Omaha-Thomson-Houston Electric Light Company was not organized or in existence at the time the ordinance in question was passed. The ordinance was passed on the 14th day of November, 1884. The articles of incorporation of the New Omaha-Thomson-Houston Electric Light Company were filed in the office of the Secretary of State of Nebraska, and the organization of the corporation effected on the second day of December, 1886. As the corporation was not in existence at the time of the passage of the ordinance, its corporate life could not measure the duration of the grant.

In the third place, at the time of the passage of the ordinance, it was not known to the city or its officials, what the corporate life of the corporation, to be organized, would be, or under the laws of what state the organization would be effected. This fact is settled by the pleadings in this cause. The averments of the bill in this respect, are as follows: (p. 5 of record):

> "Though the New Omaha-Thomson-Houston Electric Light Company aforesaid was not actually incorporated until after December 14, 1884, the

> date of the passage of said ordinance, the formation of a corporation to be known by said name and to have powers substantially the same as those which were acquired by the Thomson-Houston Company as aforesaid was at the time in contemplation by the persons who did in fact incorporate and organize said company, and they formed it with the intent and purpose of having it accept and act under said ordinance. Said intent and purpose were known to the city at the time of the passage of the ordinance, though the city did not know under what laws, whether of the State of Nebraska or some other state, the incorporation would be made, nor know whether the length of its corporate life would be limited or perpetual."

The answer of the defendant herein, contains the following statement, (p. 125 of record):

> "Defendant denies that it or its officials at the time of the passage of said ordinance, had any knowledge of the intention of any set of persons to incorporate a company with limited or unlimited powers and purposes, to accept or to act under said ordinance either as a corporation or otherwise."

As, thus, the pleadings in this case settle the fact that, at the time of the passage of said ordinance, the city and its officials were in entire ignorance of what the corporate life of the corporation to be organized to accept said grant would be, it is manifest that it was not and could not have been the intention of the city in making the grant, that it be limited to a term equal to the corporate life of the company to be organized.

It is true that the defendant attempted to prove by one witness, that the ordinance was intended to grant a right of way for a limited period. (See testimony of Ed Leeder, p. 467 of record). The testimony of this witness, however, as inspection will prove, shows that his recollection was vague and untrustworthy. He testified that the only purpose of the ordinance was to provide for lighting the streets of the the city, and that it did not contemplate the right to convey electric current to the premises of individuals for any purpose

whatever. And in no matter respecting the ordinance, was his recollection distinct; he testified to no particular controlling fact. Moreover, his testimony was incompetent because the ordinance, having been passed and accepted and large investments having been made upon the faith of the contract thereby evidenced, it is clearly incompetent to attempt, by parol evidence such as the recollection of one member of the council, to modify the plain meaning of the contract, by inserting therein, in effect, a provision limiting the life of the grant.

Moreover, the testimony was clearly incompetent, because the answer of the defendant expressly stated, as above, that neither the city nor its officials knew of the period which was to be named as the corporate life of the company to be organized.

The provision in the ordinance providing that whenever the City Council should, by ordinance, declare the necessity of removing from the public streets and alleys of the City of Omaha, the telegraph, telephone and electric poles or wires thereon constructed or existing, said company was within sixty days from the passage of said ordinance, to remove all poles or wires from such streets and alleys by it constructed, used or operated, does not amount to a reservation of power in the city to terminate, at will, the grant of the right of way which passed by the ordinance.

The proviso, on its face, shows that it was not a provision relating to the term of the grant of right of way. In the first place, the proviso could only operate whenever the City Council, by ordinance, declares the necessity for the removal. This involves the exercise of judgment as to the existence of such necessity, and is irreconcilable with the idea that the proviso gives the city an absolute and arbitrary right to terminate the grant.

In the second place, the proviso does not relate alone to the poles and wires of the Electric Light Company, but relates to a necessity to be declared of removing from the streets and alleys, "the telegraph, telephone or electric poles or wires thereon constructed." Clearly, the proviso relates only to such a necessity to be declared by ordinance, as would go beyond the removal of the wires of this company, and require the removal of telegraph and telephone wires as well.

In the third place, the words of the proviso, requiring the company to remove its wires within sixty days from the passage of the ordinance, from "such streets and alleys" clearly contemplate particular streets and alleys with respect to which there might arise a necessity for the removal of all poles and wires of all companies; and the language is inconsistent with the idea of an arbitrary right to terminate the grant with respect to all the streets and alleys of the city.

The clause cannot be of avail to the city in this cause, for the reason that no ordinance, declaring the necessity of the removal of any poles and wires whether of the Electric Light Company, or any telegraph or telephone company, from any of the streets of the city, has ever been passed, except as, under this particular provision, the city has, on several occasions, by ordinance, declared the necessity for the removal from certain streets of all telegraph, telephone and electric wires, and required the same to be placed in conduits, under ground, within certain designated districts of the city; which ordinances have been complied with by this and other companies affected thereby.

That such a proviso as this cannot be a limitation of the life of the grant, and vest in the city an arbitrary power to terminate the grant, has been decided.

In the case of the *City of New Orleans v. Great Southern Telephone & Telegraph Co.*, 40 La. An. 41, the court had before it the effect of a provision in an ordinance granting the company the right to use the streets for the construction and maintenance of poles and wires, as follows:

> "That all acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the City Council concerning the same."

The court, speaking of the effect of this proviso, and the power of the city thereunder, said:

> "The only remaining question is, whether, after granting the defendant the authority to construct and maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city—after the defendant has, at great expense, established its plant, and constructed its lines, and when it has fully complied with all the

conditions imposed—the city can now exact this large additional consideration for the continued enjoyment of privileges already granted.

"If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense, and before it had reaped a particle of return. If she can impose a charge of five dollars per pole, she can with equal power impose one of one thousand dollars, and, for that matter, she could arbitrarily revoke the grant at her pleasure.

"Either she is bound according to the terms of her proposition accepted and acted on by defendant, or she is not bound at all.

"Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside, or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the Dartmouth College Case, 4 Wheat. 518.

"The main contention of the city, however, is, that the second section of the ordinance robs it of the features of a contract, and converts the authority granted into a mere revocable permit. The section is as follows: 'That all the acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the city council concerning the same.'

"The city's construction of this section is strained and unreasonable, and conforms neither to its spirit or letter.

"It is not conceivable that the grantee would have invested its means in such an enterprise had it imagined that the term and conditions of its enjoyment of the privilege lay at the entire mercy of the city. If any such unreasonable intention lurked in the minds of the council which passed the ordinance, the grantor, under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously."

In *Northwestern Telephone Exchange Co. v. City of Minneapolis,* 81 Minn. 140, the court had before it the effect of a provision in an ordinance granting the use of the streets for poles and wires, as follows:

> "In case of a change of grade in any street or pavement so occupied by said company, it shall re-set its poles so as to conform to the grade of such street or pavement, so changed, and in such manner as the city engineer shall direct; and said poles and wires shall be removed whenever, in the opinion of the City Council, the public interest shall so require."

The city claimed that, under this clause, it possessed the reserved power to order the removal of the poles from the street at will. The court denied the contention, and said:

> "Section 5 provides that 'in case of a change of grade of any street or pavement so occupied by said company, it shall re-set its poles so as to conform to the grade of such street or pavement so changed, and in such manner as the city engineer shall direct; and said poles and wires shall be removed whenever, in the opinion of the city council, the public interest shall so require.' * * *
>
> "We cannot agree with the court below that the provisions of section 5 of the ordinance of 1883, which provides for the removal of poles by direction of the municipality, contains a reservation of authority in the city to enforce the removal of the same at its pleasure. Conceding that the provisions of section 5 extend to the whole ordinance—which we do not decide—and thereby authorized the city to order the removal of the poles from streets not being graded, such power cannot be unreasonably and arbitrarily exercised. This provision manifestly implies the exercise of judgment upon such necessities as are always liable to arise in improving the streets, to be enforced only for the public good in the administration of municipal functions, under the authority of the police power. In a proper case, where the city exercises its power of control in the regulation of the use of the streets by the plaintiff, based upon

necessity and the interests of the public, that power will be sustained. Beyond that limit it cannot go."

In the late case of *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, this court said (page 663):

> "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the state's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city, and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint."

Obviously, this reasoning is as applicable to the introduction of an electric lighting system, with its central generating plant and connected lines of poles and wires, as to the construction of a telephone system.

It is competent for a corporation to accept a grant of a right of way in the streets of the city, for its corporate purposes, for a period longer than its corporate life.

This Court has specifically decided that a corporation may accept and be possessed of a grant of a right of way in the streets of a city for its corporate purposes, although the period of the grant is longer than the corporate life of the company. *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368.

As, under the ordinance in question, the right of way was granted in terms which expressly recognized the right of assignment and without limitation as to time, and with no reserved power in the city to alter or revoke the same, under

general principles of law, there passed to the grantee in the ordinance when the same was accepted, a right of way over the streets, alleys and public places of the city, for the purposes mentioned, "in perpetuity."

We need not at great length, in the present instance, indulge in the citation of authorities bearing upon the question. In view of the fact that the grant of the right of way was not a mere gratuity, but, on the contrary, its acceptance imposing upon the grantee the obligation to perform a public service, the grant became a contract for a consideration. As the grant was without limitation of time, and without a reservation of power to revoke it, the grant was "in perpetuity;" to hold otherwise, would be to inject into the grant, a qualifying clause, limiting the term, when such clause is not contained in the instrument. This is especially true when the grant was not specifically limited to a particular corporation, but ran to the corporation or its assigns, thereby showing that it was expressly in contemplation, that the right of way granted by the ordinance, was transferable. Grants of that kind have not infrequently been made to an individual and his assigns, but we have never heard it contended in such an instance, that the duration of the franchise was limited to the life of the person named.

In the case of *Board, Etc., of Morristown v. East Tennessee Telephone Co.,* 115 Fed. 304, Mr. Justice Lurton, then Circuit Judge, in delivering the opinion of the Circuit Court of Appeals for the Sixth Circuit, said (p. 307):

> "The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved. This principle has too many times been declared and applied by this court to require further elaboration. *Detroit Citizens' St. Ry. Co. v. City of Detroit,* 12 C. C. A. 365, 64 Fed. 628, 26 L. R. A. 667; *Louisville Trust Co. v. City of Cincinnati,* 22 C. C. A. 334, 76 Fed. 296; *Iron Mountain R. Co. v. City*

> *of Memphis*, 37 C. C. A. 416, 96 Fed. 113; *Citizens' Ry. Co. v. Africa*, 23 C. C. A. 252, 77 Fed. 501. * * * Street rights so vested cannot be devested without the consent of both parties or by clear acts of abandonment indicating an intention not to accept. *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296. The street rights thus granted are of course, subject to the provisions of the ordinance itself, as well as the police power of the city, which can never be contracted away. * * * What we do decide is that the East Tennessee Telephone Company acquired a valid and irrevocable right to erect its poles and string its wires on and over the streets and alleys of Morristown, under and subject to the terms and provisions of the ordinance of September 1, 1899."

In *People v. O'Brien*, 111 New York 1, in an exhaustive opinion, the court held that by the grant of a right of way in the streets, without limitation as to time, to a public service corporation for its purposes, where there was no reservation in the granting ordinance of a power to alter or revoke, there passed to the public service corporation, a right of way or easement in the streets, "in perpetuity;" this though the corporation accepting the grant was organized for a limited period; and this though its corporate existence might be ended. The court said in part (p. 38, *et seq.*):

> "It will be convenient, in the first instance, to consider the nature of the right acquired by the corporation under the grant of the common council with respect to its terms or duration. This is to be determined by a consideration of the language of the grant, and the extent of the interest which the grantor had authority to convey. We think this question has been decided, by cases in this court which are binding upon us as authority, in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll v. New York etc. R. Co.*, 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that, where no limitation or restriction upon the right

conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

"The title to streets in New York is vested in the city, in trust for the people of the state, but under the constitution and statutes it had authority to convey such title as was necessary for the purpose to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity which should be irrevocable. *Yates v. Van DeBogert*, 56 N. Y. 526. Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity for the purposes of a street railroad. *People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *Mayor v. Railroad Co.*, 32 N. Y. 261; *Railroad Co.* v. *Kerr*, 72 N. Y. 330. Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point. In *Milhau v. Sharp*, Judge Selden said, with reference to a grant from the common council of New York in no material respect differing from this: 'It amounted to an immediate grant of an interest, and, it would seem, of a freehold, in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. * * * The title to the rails, when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are, therefore, granted to the defendants by the resolution.' Judge Comstock, in *Davis v. Mayor, etc.*, said: 'As the consideration for con-

structing the road, the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and, within a maximum limit, they can charge what they please for the carriage of passengers. These rights are, in effect, granted in perpetuity.' In the case of *Mayor, etc., v. Railroad Co.*, 32 N. Y. 272, it was said: 'Assuming that the common council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto, and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise, which the common council could not take away or impair by any subsequent act of its own.' The resolution of the common council in this case expressly provided for traffic contracts, by which the Broadway & Seventh Avenue Railroad Company should obtain a right to run cars over the tracks of the Broadway Surface Railroad; and no conditions upon the right granted to the Broadway Surface Railroad Company in respect to the duration of such contract rights or otherwise, were imposed by the terms of the grant. It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation or those who might lawfully succeed to its rights. When we consider the mode required by the statutes and the constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible; for it cannot be supposed that either the legislature or the framers of the constitution intended to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done. Neither can it be supposed that they contemplated the resumption of property which they had expressly authorized their grantee to mortgage and otherwise dispose

of, to the destruction of interests created therein by their consent. We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property, within the usual and common signification of that word. *Railroad Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 N. Y. 263.

"When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question but that, in the view of the legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term. It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally."

In *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, this court endorsed the decision in the case of *People v. O'Brien*, above quoted, in the following words (p. 395):

"People v. O'Brien is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to prop-

> erty necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case, in 123 N. Y., announces the same doctrine. It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation, property for its use, the title to which it might own in fee."

In the case of *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, this court, speaking of the duration of grants of rights in streets made to public service corporations, say (page 664):

> "The earlier cases are reviewed in *Detroit St. R. R. v. Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit v. Detroit St. R. R.*, 184 U. S. 368, 395, this court there saying that, 'Where the grant to a corporation of a franchise to construct and operate its road is not by its terms, limited and revocable, the grant is in fee."

The Circuit Court of Appeals, in holding that the right of way granted by the ordinance in question was for a limited period, namely twenty years, did not analyze any of the cases above mentioned, but cited in support of its decision, only two cases in this court. Neither of these cases is an authority for the decision.

The first case cited, is the case of *Turnpike Co. v. Illinois*, 96 U. S. 63. That was a case wherein, by an act of the Legislature of Illinois, a corporation was organized and empowered to maintain a certain turnpike, erect toll gates and collect tolls, the life of the corporation being fixed for twenty-five years. The act specifically provided that the state could pur-

chase the road at the expiration of the charter, paying the company the original cost of construction. Certain supplementary legislation was passed at a later period. The court held that, as the grant to the company of the rights was in the enactment which created the corporation and fixed its life at twenty-five years, the instrument, taken as a whole, shows that the purpose of the legislature was that the grant should be limited to the period named, and not be perpetual. This decision was manifestly a construction of the particular act of the legislature of Illinois, and was based upon the particular facts thereby presented.

The other case cited by the Court of Appeals, is *Blair v. Chicago*, 201 U. S. 400. In that case, the court held that a grant of a right of way to a street car company which was without express limitation of time, was, because of the particular circumstance attending the grant plainly limited to a specific term. The circumstances were, that the company to which the grant was made, was operating its system of a street railway in Chicago under a grant limiting its right to a particular term of years. The particular grant referred to, was a grant of a right to this company to extend this system into another portion of a community. Clearly, as the grant was to this particular company and to extend its system, the tracks to be constructed to be a part of the system, and as the life of the system was limited to a term of years, this particular grant, construed in the light of these facts, was plainly intended to be for such limited period. The court held also that the term was limited to the life of the municipality. Manifestly, this case, like the case of *Turnpike Company v. Illinois, supra*, rests upon the peculiar facts presented by the record. Clearly these cases were not intended to establish the proposition that in no instance can a grant of a right of way without limit as to time be held to be a grant in perpetuity.

The same may be said of the case of *Detroit Citizens', Etc., Co. v. Detroit Railway*, 171 U. S. 48, wherein it was held that the City of Detroit had no inherent or delegated authority to confer an exclusive street railway privilege to one company.

It is the law of Nebraska, as declared by the Supreme Court of that state in a consistent series of decisions, that by ordinance, such as the one in question, when accepted, there

becomes vested in the grantee, in perpetuity. a right of way in the streets for the purpose named; and further, that cities in Nebraska, with charter powers similar to those possessed by the City of Omaha at the time of the passage of the ordinance in question, are vested with authority to grant such rights in perpetuity.

In the case of *Nebraska Telephone Co. v. City of Fremont*, 72 Neb. 25, the Supreme Court of Nebraska had before it, for decision, this precise question. The City of Fremont had adopted an ordinance, section one of which was as follows:

> "That any person, company, or corporation, is hereby authorized to erect poles and wires on the streets of the City of Fremont for the purpose of erecting and maintaining any telephone, telephones, telegraph or telegraphs, upon obtaining the consent of the mayor and council of said city to such use of the streets; provided, that such poles and wires be so erected as to in no manner interfere with the public use of the streets and sidewalks of said city; and provided further, that the erection of such poles and wires shall always be under the supervision and control of the committee on streets and sidewalks of said city, and provided further, that the location and height of any pole or wire may at any time be changed by the council."

The ordinance was passed on the 19th of December, 1881. It was passed on the application of certain individuals united in an association not incorporated. This association accepted the ordinance, constructed a telephone plant in the city, and afterwards transferred the plant to the Nebraska Telephone Company, a corporation which, with the consent and approval of the city, operated and extended the plant. In December, 1902, the city adopted a resolution forbidding the Nebraska Telephone Company to erect poles in the streets or parts of the streets not then occupied by the company, and also forbidding the company from making any repairs upon the plant then operated. The company filed a bill to enjoin the city from enforcing this resolution. The lower court, by final decree, perpetually enjoined the enforcement of the ordinance, and the city appealed the case to the Supreme Court.

As the decision of the Nebraska Supreme Court in this case is decisive, in order that no possible question can be

raised as to the force and effect of the decision, the complainant in this case introduced into the record, extracts from the briefs of the parties to the above mentioned case, to show precisely the contentions of the two parties which were presented to the Supreme Court.

In the brief on behalf of the City of Fremont, the contention was specifically made that the grant, under the ordinance, of the right upon the streets of Fremont, was for a reasonable period only, which period had expired; and, therefore, that the Telephone Company had no right to extend its plant to streets and parts of streets not then occupied by the company, and had no right to perpetuate its occupancy of the streets already occupied, by repairing the plant then in existence. And it was insisted these questions should be passed upon by the Supreme Court. The following extracts from the brief on behalf of the city, illustrate the contention (pp. 358-9 of record):

> "In that answer, among other things, 'the defendants pray for judgment determining said resolution to be valid in both its prohibitions, that is to say, valid, First, in prohibiting the plaintiff from extending its telephone lines in the streets, avenues and alleys of said city, and making new connections therein, and valid, Second, in prohibiting the plaintiff from perpetuating its occupancy of the streets, avenues, and alleys of said city, by repairing and renewing its telephone lines and connections already erected in the streets, avenues and alleys of said city, at the time of the adoption of said resolution. * * * Notwithstanding, we failed in the District Court, to get any attention to these questions; and notwithstanding that our contentions urged, that if the plaintiff had any right at all to occupy the street, such right was limited to such occupation at the passage of the resolution, and it did not carry with it a right to acquire further and additional occupation of streets, nor a right to perpetuate its occupation beyond a reasonable time, to-wit: beyond the time nature would remove the occupation, were treated with silent contempt, still we believe that upon the record in this case the city is entitled to have these

questions considered, and, in that belief, we make our request, for their consideration in this court."

In the brief filed in the case on behalf of the Telephone Company, the contention was made that when the grant once became operative, and was accepted and acted upon, it constituted a contract the obligation of which could not be impaired by any action of the state or its municipalities. The following extract from the brief of counsel for the Telephone Company clearly states the contention made. (See p. 359 of record):

> "The grant by the city having been acted upon, and large sums of money having been expended upon the faith of it, has become a contract, the obligation of which cannot be impaired by any act of the city, nor by any other instrumentality of the state, this being forbidden by the Constitution of the United States, as well as by that of the State of Nebraska.
>
> "The city can regulate the use of the streets by plaintiff, by ordinance enacted for the protection of the public use of the streets, but this is the extent of its power."

The Supreme Court of Nebraska, therefore, had before it for decision, the question whether this grant of right of way, by the ordinance, where no limit of time is stated, and where no right to alter or revoke was reserved, was a grant of the right of way for a reasonable period only, to be determined, or whether it was a grant of the right of way in perpetuity; both contentions being, as we have shown, argued before the court. The Supreme Court met the question and clearly determined it. That court said (72 Neb. 29):

> "By the terms of the ordinance, there was a grant to the association, in perpetuity, of a right of way or easement over all its public ways, without restriction or limitation. It was subject to certain conditions and regulations as to the manner of user, which are not in controversy here, and which we have not thought it necessary to set forth, and it was and is doubtless forfeitable for unspecified acts of abuse, abandonment and non-user."

Thus, the Nebraska Supreme Court clearly, distinctly and unequivocally declared the law of Nebraska to be, that this ordinance, granting a right of way over the streets of

Fremont to this public service company, was a grant of the right of way or easement in the streets, in perpetuity.

Further, referring to the power of the City of Fremont to make the grant, the court said (p. 27):

> "There is no question as to the authority of the city to grant the license or privilege as by these proceedings it purported to do."

This decision, therefore, declares, as the law of Nebraska, two propositions:

(1) That a grant by a municipality of an easement in the streets to a public service corporation for the transaction of its business, where no time limit is specified, and no reservation of a power to alter or revoke is contained in the ordinance, conveys to the public service company, when the ordinance is accepted and acted upon, a right of way or easement in the streets for the purpose named, in perpetuity. And,

(2) That the City of Fremont had the power to make such a perpetual grant.

In the case of the *City of Plattsmouth, Appellant, v. Nebraska Telephone Company, Appellee*, 80 Neb. 460, the Supreme Court of Nebraska again had the precise question before it for decision. In this case, it appeared that the City of Plattsmouth passed an ordinance, the relevant portion of which is as follows (p. 463):

> "Section 1. That the Nebraska Telephone Company, its successors and assigns, be and are hereby granted a right of way for the erection and maintenance of poles and wires and all appurtenances thereto, for the purpose of transacting a general telephone and telegraph business, through, upon and over the streets, alleys and public grounds of the City of Plattsmouth, Nebraska."

Afterwards, the city passed an ordinance directing the wires of the company to be removed from the main streets of the city. The company, failing to comply with the ordinance, the city brought an action in equity praying in the alternative, first for an injunction restraining the defendant company from using or occupying the streets of Plattsmouth for the operation of its telephone system, and, alternatively, if the company had a franchise, that it be required to remove its poles and wires from the main streets and place them in the alleys.

The claim of the city that the company had no right to use its streets, was predicated upon the contention that the ordinance granting the right of way to the company, was void. It was admitted that the right of way granted by the ordinance was perpetual in time, as such had been the specific and defined holding in the case of the *Nebraska Telephone Company v. Fremont* above cited, but the city contended that before a perpetual right of way in the streets could be granted by a city, express authority for that purpose must be given the city, by the Legislature, in its charter; and the contention was made that the City of Plattsmouth had no such express delegation of authority. It was recognized, that, in the decision in the case of the *Nebraska Telephone Company v. Fremont, supra,* language was used indicating that the city had such authority, but an attack was made upon the decision in the Fremont Case, and the attention of the Supreme Court again called to the question.

Extracts from the briefs of the counsel for the respective parties were put in evidence in this case by the complainant. The lower court having dismissed the bill, the City of Plattsmouth appealed, and its counsel, in his brief, after citing authorities to show that the power over streets possessed by cities, is not sufficient authority to warrant the granting of the right of way in the streets to a public service corporation for even a limited period of time, proceeds as follows (see p. 366 of record):

> "But defendant claims a perpetual franchise in the streets of Plattsmouth upon the very opposite view of the law. * * * The case of *The Nebraska Telephone Co. v. City of Fremont,* 99 N. W. 811, will undoubtedly be cited by the defendant and the doctrine of *stare decicis* invoked; but this case is not a statement of the law as it existed in Nebraska prior to the date of this decision. In this case the court ignores the law that the legislature is supreme and that a municipality is only the agent of the state, ignores the law which undoubtedly is and has been since the organization of the state, that before a municipality can grant a franchise or any privilege which is legal under the statute and the constitution that the power must first have been conferred upon the city by the state. The court in this case nowhere places its finger on

the statute which grants this power to the City of Fremont. The whole case is a piece of bad judicial legislation. Mr. Commissioner Ames contents himself with the statement of the conclusion in these words: 'There is no question as to the authority of the city to grant the license or privilege as by these proceedings it purported to do.' The very fact that he failed to find the statute and to reason this point shows that the conclusion is founded on nothing."

The counsel for the Nebraska Telephone Company contended that the franchise conveyed an easement in the streets, in perpetuity, and that the City had power under its charter, to make the grant. His contention in this respect, is as follows (p. 373 of record):

"The grant to defendant, by the ordinance of October 19, 1898, is an inviolable contract, under the contract clause of the constitutions of the state and of the United States.

"There was no fact proven to authorize the exercise of the police power, and the ordinance requiring poles to be removed from Main Street was not adopted in the exercise of that power.

"It is not the slightest importance whether we call the right granted by the ordinance of October 19, 1898, to occupy the streets, a franchise or license, or by some other name. It is a property right—an easement in real estate, and the grant was perpetual and of all streets. Such rights are now, generally designated as franchises, by the courts and in legislation; but by whatever name the right may be designated it has been universally held that the acceptance of such a grant creates a contract, the obligation of which cannot be impaired.

"A grant of power, such as we have in the case at bar, to make all ordinances and regulations, not inconsistent with laws of the state, deemed expedient for maintaining the welfare of the municipality and the trade, commerce and manufactures of its people; to regulate the placing of structures upon, over, and in the streets and sidewalks; to create, open, widen or extend any street,

avenues, alley or lane, and to annul, vacate, or discontinue the same, whenever deemed expedient for the public good, is a comprehensive grant of power to be exercised in the interest of the public, to secure for the public the benefit of such new uses and conveniences as could not be foreseen and enumerated and as may from time to time come into vogue and be of public advantage. The object in granting such powers to a municipality is to enable the municipality to secure advantages and benefits to the city itself, as a corporate entity, and to its inhabitants. Such a grant of power must of necessity be interpreted with reference to the object which the legislature sought to accomplish in delegating the power and with a view to promoting that object."

Counsel for the company further contended that, as the franchise granted a right of way, in perpetuity, which, when acted upon, became a contract, and as the city had power to make such contract, it followed that the only power of control which the city possessed, was the police power; and that no reasonable necessity existed for the removal of the poles from the main street, and, therefore, the ordinance was not justified. (See extracts from brief, pp. 373-377 of record.)

The Supreme Court of Nebraska, having thus before it the contentions of the parties, quote with approval, the language of the Supreme Court of Minnesota, as follows (80 Neb., 467):

> "An ordinance of a municipality surrendering a part of its powers to a corporation to secure and encourage works of improvement which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured."

The court, meeting the claim of the counsel for the city that the charter powers of the city were not adequate to authorize the grant in perpetuity, reviewed the provisions of the charter of the City of Plattsmouth which, in addition to the general control of the streets, gave to the city the following power (p. 465):

> "To make all such ordinances, by-laws, rules, regulations, resolutions not inconsistent with the laws of the state as may be expedient in addition to the special powers in this chapter granted, maintaining the peace, good government and welfare of the corporation and its trade, commerce and manufacturies."

The court then said (p. 466):

> "Under the general power given to the plaintiff by its charter, and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds, cannot be questioned. *Neb. Tel. Co. v. City of Fremont,* 72 Neb. 25."

In this case, the Supreme Court of Nebraska further disposes of a contention made by the city to the effect that the ordinance was void under the Constitution of Nebraska. The Nebraska Constitution forbids the granting of any special privilege, immunity or franchise whatever. And the city claimed that this grant of a right of way over the streets of Plattsmouth, in perpetuity, was a grant of special privilege and in violation of the constitutional provision. The Supreme Court, however, held that the constitutional provision prohibited only the granting of exclusive franchises or privileges; and, as the grant to the telephone company under the ordinance while perpetual, was not exclusive, it was not prohibited by the constitutional provision mentioned.

In *State v. Lincoln Street Railway Co.,* 80 Neb. 333, the Supreme Court of Nebraska, speaking of the grant by a city, through the consent of the electors, of a right to a street railway company to operate upon the streets, said (p. 343):

> "This consent of the electors when legally given to a legal proposition submitted to them, constitutes, in our view, the grant of a right of way on and over the streets named in the Articles of Incorporation, and in the notice for the election, and confers upon the railway company, an easement in the streets which is irrevocable after the company has, within a reasonable time, acted upon the permission given and constructed its lines of road."

In *State v. Citizens' Street Railway Company*, 80 Neb. 357, the Supreme Court of Nebraska said (p. 360):

> "It cannot be questioned, however, that, under our Constitution and the statute relating to the formation of street railway companies, the electors of the City of Lincoln had the power to confer on such companies the right to construct and operate a street railway within the corporate limits of the city. In the exercise of this power the termini of the road and the route to be taken between such termini should be set forth in the proposition voted on. When this is done, the line of road is fixed and definite, and the right to construct this line is vested in the company, and is beyond recall, as everything necessary to a valid and complete exercise of the power has been done."

In *Sharp v. City of South Omaha*, 53 Neb. 700, the Supreme Court of Nebraska, after quoting the plenary power of the City of South Omaha over the streets, said (p. 705):

> "We need not consider whether contracts may be made for lighting the streets with persons who have not gas works within the city. Entirely distinct from the provisions on that subject (special provisions for contracts with companies having gas plants within the city), there is an ample grant of power, unqualified as to persons, method, or time, to regulate the laying down of mains, the sale and use of gas, and the rate to be charged therefor."

Thus, by uniform course of decision, it is the settled and declared law of Nebraska, that cities have the authority under the Nebraska Statutes, to grant to public service corporations, in perpetuity, a right of way over the streets of such cities for their corporate purposes. And it is equally settled that a grant of a right of way by a city in Nebraska without limitation as to time, and without a reservation of the power to alter or revoke the grant, vests, upon acceptance by the grantee, a right of way in the streets mentioned, in perpetuity.

This rule of law has always met with acceptance by all departments of the government.

The first of the decisions mentioned, was rendered by the Supreme Court of Nebraska in 1898. From that time, hitherto, every two years, the Legislature of Nebraska has been in session, and, with the decisions above referred to, announced from time to time, no attempt has ever been made by the Legislature of the state to modify, by legislation or otherwise, the rule of law above stated. The law and the policy of the State of Nebraska, are thus evidenced by this series of decisions extending over a number of years.

The opinion of the Circuit Court of Appeals did not discuss or give any effect, whatever, to these decisions of the Supreme Court of Nebraska.

The charter powers of the City of Omaha, in 1884, *were as broad as were the charter powers of the cities of Plattsmouth and Fremont at the time of the decisions in the cases above mentioned.*

Plattsmouth and Fremont were both cities of the second class, and possessed the same charter powers. In the opinion in the case of the *City of Plattsmouth v. Nebraska Telephone Company,* 80 Neb. 460, above cited, the Supreme Court, at page 465, quoted the charter provisions which, in their judgment, vested in the city the power to grant to a telephone company, a right of way in perpetuity, over the streets of the city for its poles and wires. The sections are as follows:

> "Subdivision XII, sec. 69 of plaintiff's charter (Comp. St. 1905, ch. 14, art. I) is in the following words: 'To make all such ordinances, by-laws, rules, regulations, resolutions, not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this chapter granted, maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactures.' Subdivision 24 of said section authorizes the city authorities to regulate the streets, 'lamp-posts, awning posts, and all other structures projecting upon or over and adjoining, and all other excavations through and under the sidewalks in the said city or village.' Subdivision 28 empowers the city or village 'to open, create, widen, or extend any street, avenue, alley, or lane, or annul, vacate, or discontinue the same whenever deemed expedient for the public good.'"

It will be noticed that by subdivision XII of Section 69 of the charter, the city was given general power of legislation respecting the city's needs, and, in the other subdivision, it was given control over the streets and public grounds of the city. Upon both of these charter provisions, the decision of the Supreme Court rests. The court said (p. 466):

> "Under the general power given to the plaintiff by its charter, and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds cannot be questioned. *Nebraska T. Co. v. City of Fremont*, 72 Neb. 25."

The charter of the City of Omaha, in 1884, at the time of the passage of the ordinance in question, was quite as broad, in its grant to the city of general power and its grant of general control over its streets and public grounds, as was the charter of the City of Plattsmouth in the provisions quoted. The charter provisions of the City of Omaha in this regard, in 1884, were as follows (see pp. 225-226 of record):

> "Sec. 15 (Powers of Council). The mayor and council of each city created or governed by this act, shall have the care, management and control of the city, its property and finances, and shall have power to pass any and all ordinances not repugnant to the constitution and laws of this state, and such ordinances to alter, modify, or repeal, and shall have power,
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> * * * * * * * * *
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> "8th. (Light Streets—Gas.) To provide for the lighting of streets, laying down of gas-pipes and erection of lamp posts, and to regulate the sale of gas, and rent of gas meters within the city.
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> * * * * * * * * *
>
> "24th. (Streets.) To care for and control, to name and re-name streets, avenues, parks and squares within the city; to provide for the opening, vacating, widening and narrowing of streets, avenues, and alleys, within the city under such restrictions and regulations as may be provided by law."

With these charter provisions in mind, the decisions of the Supreme Court of Nebraska, as to the power of cities to

grant, in perpetuity, the right of way over their streets to public service corporations, are seen to apply with all their force to the City of Omaha, and to the ordinance in question.

In addition to these charter provisions it should be borne in mind that the City of Omaha has title in fee to its streets and alleys. (*Davis v. City of Omaha*, 47 Neb., 836)

The bondholders, represented by complainant, purchased their bonds with knowledge of and in reliance upon the law of Nebraska, as announced by the Supreme Court, to the effect that the City of Omaha had, under its charter, authority to grant a right of way in perpetuity to the New Omaha-Thomson-Houston Electric Light Company over the streets and public grounds of Omaha, and that, by the said ordinance, there was granted to said company, or assigns such a right of way in perpetuity.

Upon this point, the testimony is specific and uncontradicted. The decision of the Supreme Court of Nebraska in the case of the *Nebraska Telephone Company v. The City of Fremont, supra,* was handed down in May, 1904. The first purchase of the bonds, issued by the Omaha Electric Light & Power Company, was made in July, 1905. (See testimony of Arthur Perry, p. 184 of record, and testimony of Mr. W. E. McGregor, p. 191 of record.) The first issue of bonds amounting to more than $1,000,000 was purchased, as was stated, by the bondhouses of Perry, Coffin & Burr and N. W. Harris & Co., jointly. By personal inspection, these purchasers were familiar with the plant and properties of the company at Omaha, the character and nature of the business carried on by the company in the City of Omaha, and the revenues derived by the company therefrom. The purchasers were also advised, by the president of the company, that, in the opinion of the Nebraska counsel of the company, the franchise of the company was unlimited in time, and satisfactory from a business standpoint. But, before these houses would buy the bonds, they required an opinion from their own counsel, Messrs. Ropes, Gray & Gorham of Boston, as to the nature and validity of the franchise; and they received, from their said counsel, an opinion that the franchise was unlimited as to time. Relying upon this opinion, these houses purchased these bonds in July, 1905, to the extent of more than $1,000,000 and proceeded to sell the bonds to their customers, issuing circulars for that purpose, wherein the nature of the bus-

iness of the company was set out, and the opinion of the local counsel of the company and of Messrs. Ropes, Gray & Gorham to the effect that the franchise of the company was unlimited as to time, was stated; and the bonds were recommended by these houses for investment. Subsequently, other issues of the bonds were purchased by these houses, and by them in turn sold to their clients.

All this is detailed in the testimony of Mr. Perry and Mr. McGregor at pp. 183 to 192 of record; and a copy of the circular, issued by the bondhouses to their clients, upon which the bonds were sold to individual purchasers, is found on pages 192 to 198 of the record.

Thus it is distinctly established by the record in this case, that, prior to the purchase of these bonds, the Supreme Court of Nebraska had declared the law of that state to be that an ordinance, such as this, granted to the public service company, for its use, a right of way, in perpetuity, over the streets, alleys and public grounds of the city, and that the City of Omaha, under its charter, had the authority to make such a grant of right of way in perpetuity. Lawyers investigating the validity and extent of this franchise for the purpose of advising with respect to investments in the bonds of this company, advised their clients, in accordance with the decisions of the Supreme Court of Nebraska, that the franchise rights were unlimited in time. On the faith of this opinion, and in reliance upon it, more than $1,000,000 of bonds were purchased in July, 1905, and afterwards later purchases made so that the aggregate of bonds now outstanding, exceeds $2,000,000.

It is therefore established, not as a matter of conjecture, but as a fact proven in the record, that this large investment was made in reliance upon the law of the State of Nebraska, as declared by the Supreme Court of that state.

The law of the State of Nebraska, as declared by its Supreme Court construing the powers of cities under the statutes of that state and construing the effect of ordinances passed by such cities pursuant to such charter authority, entered into, and became part of the contract evidenced by the ordinance in question and its acceptance.

The complainant in this case relies upon the provision of the Constitution of the United States which prohibits a state from impairing the obligation of a contract. While it

is true that, in all such cases, this court will determine for itself, independent of state decisions, whether a contract in fact exists, yet, in determining such fact, this court will always recognize the principle that the law of the state where the contract is made, as declared by the highest court of that state before investments have been made, does enter into and become a part of the contract.

This has been repeatedly held by this court.

In *Gulf and Ship Island R'd Co. v. Hewes,* 183 U. S. 71-72, the court said:

> "While the question of contract or no contract in a particular case is one which must be determined by ourselves, every such alleged contract is presumed to have been entered into upon the basis, and in contemplation of, the existing constitution and statutes, and upon the established construction theretofore put upon them by the highest judicial authority of the state. *Taylor v. Ypsilanti,* 105 U. S. 60; *Wade v. Travis County,* 174 U. S. 499, 509, and cases cited."

In *Brine v. Insurance Co.,* 96 U. S. 634 and 637, the court said:

> "And that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.
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> * * * * * * * * *
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> "All contracts between private parties are made with reference to the law of the place where they are made or are to be performed. Their construction, validity, and effect are governed by the law of the place where they are made and are to be performed, if that be the same, as it is in this case. It is, therefore, said that these laws enter into and become a part of the contract."

In *Edwards v. Kearzey,* 96 U. S. 595, the court said (p. 601):

> "It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or in-

> corporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement. *Von Hoffman v. City of Quincy, supra; McCracken v. Hayward,* 2 How. 508."

Where, upon the faith of a state decision affirming the validity of contracts made, or bonds issued under a statute, other contracts have been made or bonds issued under similar statutes, neither the legislature nor the judiciary of a state can modify the law so as to impair the obligation of the contract previously made.

It has not been of infrequent occurrence that different departments of state governments have sought to change existing laws, as interpreted by the highest court of the state, and thereby impair obligations of contracts entered into upon the faith of the previous law as declared by the highest court of the state. Sometimes the attempt has been made by legislation, and some times such an effect has been claimed because of a change in the decisions of the highest court of the state. But, in all such cases, this court has held such attempts futile. The decisions of this court have been steadfast to the effect that, where investments have been made upon the faith of the law of the state as declared by the Supreme Court, the contract thereby resulting is protected by the Constitution of the United States against any attempted change of the law, either through direct legislation, or through a change of judicial decision.

In *Wade v. Travis Co.,* 174 U. S. 499, after stating that, as a general rule, this court adopts the decisions of the State Supreme Court, construing its statutes, it is said (p. 509):

> "An exception has been admitted to this rule, where, upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the state. To have held otherwise would enable the state to set a trap for its creditors by

inducing them to subscribe to bonds and then withdrawing their own security. *Gelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa County*, 3 Wall. 294; *Mitchell v. Burlington*, 4 Wall. 270; *Riggs v. Johnson County*, 6 Wall. 166; *Lee County v. Rogers*, 7 Wall. 181; *Chicago v. Sheldon*, 9 Wall. 50; *Olcott v. Supervisors*, 16 Wall. 678; *Douglass v. Pike County*, 101 U. S. 677; *Burgess v. Seligman*, 107 U. S. 20."

In *Taylor v. Ypsilanti*, 105 U. S. 71-72, this court said:

"But all along through the reports of our decisions are to be found adjudications in which, upon the fullest consideration, it has been held to be the duty of the Federal Courts, in all cases within their jurisdiction, depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the state at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal Courts will accept or adopt the construction which the state courts give to their own Constitution and laws. 'The sound and true rule,' said Mr. Chief Justice Taney, in *Ohio Life Ins. Co. v Debolt* (16 How. 416, 432), 'is that if the contract when made is valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law.' So in *The City v. Lamson* (9 Wall. 477, 485), Mr. Justice Nelson, speaking for the court, said: 'It is urged, also, that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit, and issue the bonds in question, was in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued,

the decisions of the courts of the state favored the validity of the law. The last decision cannot, therefore, be followed.'

"Again, in *Olcott v. The Supervisors* (*supra*), the court, speaking through Mr. Justice Strong, said: 'This court has always ruled that if a contract when made was valid under the constitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature, or the judiciary, will be regarded by this court as establishing its invalidity.' To the like effect are some very recent decisions of this court. In *Douglas v. County of Pike* (101 U. S. 677), upon a review of some of the previous cases, the court, speaking by the present Chief Justice, said that 'the true rule is to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes, the same in its effect on contracts, as an amendment of the law by means of a legislative enactment. So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.'"

In *Loeb v. Columbia Township Trustees*, 179 U. S. 472, the court said (pp. 492-494):

"What, under these circumstances, was the duty of the Circuit Court? That court, speaking by Judge Thompson, held that its duty was to enforce the provisions of the Constitution of Ohio as interpreted by the Supreme Court of that State at the time the bonds were issued, and not permit the contrary decisions, made after the bonds were

issued, to have retroactive effect. This was in accordance with the long-established doctrine of this court, to the effect that the question arising in a suit in a Federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the State when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation. Our decisions to that effect are so numerous that any further discussion of the question is unnecessary and we need only cite some of the adjudged cases. *Rowan v. Runnels,* 5 How. 134; *Ohio Life Ins. and Trust Co. v. Debolt,* 16 How. 416, 432; *Olcott v. The Supervisors,* 16 Wall. 678; *Douglass v. County of Pike,* 101 U. S. 677; *Taylor v. Ypsilanti,* 105 U. S. 60, 71; *County of Ralls v. Douglas,* 105 U. S. 728; *Green County v. Conness,* 109 U. S. 104, 105; *Anderson v. Santa Anna,* 116 U. S. 356, 361-2; *German Savings Bank v. Franklin County,* 128 U. S. 526, 539; *Wade v. Travis County,* 174 U. S. 499, 510.

"It should be here said that the doctrine of prior cases was not in any wise changed or impaired by the decision in *Central Land Company v. Laidley,* 159 U. S. 103, 111, in which it was held that, under the statute giving this court authority to review the judgment of the highest court of the state, we were without jurisdiction if the action of that court was impeached simply on the ground that it had not determined the rights of the plaintiff in error in accordance with its decisions in force when those rights accrued, but had followed its decisions of a contrary character rendered after his rights had accrued. This court held that a mere change of decision in the state court did not present a question of Federal right under that clause of the Constitution of the United States prohibiting a state from passing any law impairing the obligation of contracts—that the question of such impairment did not arise unless the judgment

complained of gave effect to some provision of the state constitution or some enactment claimed by the defeated party to impair the obligation of the particular contract in question. As, however, the Circuit Courts of the United States are courts of 'an independent jurisdiction in the administration of state laws, coordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws,' *Burgess v. Seligman*, 107 U. S. 20, 33, 34; *Folsom v. Ninety-six*, 159 U. S. 611, 624, 625, they may, in suits within their jurisdiction, properly hold, as in numerous cases this court has held, that the rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local law as maintained by the highest court of the state at the time such rights accrued. The statutory provision that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply, Rev. Stat. Sec. 721, has not been construed as absolutely requiring conformity, in such cases, to decisions of the state courts rendered after the rights of parties have accrued under the previous decisions of those courts of a contrary character."

In *Wilkes County v. Coler*, 180 U. S. 506, the court said p. 531):

"It is the settled doctrine of this court 'that the question arising in a suit in a Federal Court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation,' *Loeb v. Trustees of Columbia Township*, 179 U. S. 472, 492, and authorities there cited."

II.

The distribution and sale of electric energy to be utilized for power and heat purposes, is within the purpose for which the New Omaha-Thomson-Houston Electric Light Company and assigns was granted the right of way over the streets of Omaha.

The ordinance in question (page 3 of record), granted to the New Omaha-Thomson-Houston Electric Light Company or assigns, the right of way for the erection and maintenance of poles and wires with all appurtenances thereto, through, upon and over the streets, alleys and public grounds of the City of Omaha, Nebraska, "for the purpose of transacting a general electric light business."

It will be noted that the expression "general electric light business" is comprehensive, rather than restrictive. Its plain purpose was to grant the right of way for all the uses and purposes included within the function known as the electric light business.

Ordinarily, in the determination of the question of what is included within any specific business the courts have the aid of lexicographers. The terms used have usually been of such long standing that they have acquired a well known, definite meaning through the course of years, and these meanings of the term are collated and expressed in the dictionaries. But in the determination of the question what functions were included within the expression "general electric light business" in the fall of 1884, the court will find no such aid. When the ordinance in question was passed, in December, 1884, the electric light business was in its infancy, being barely four years old. To know what functions were embraced within the expression "general electric light business" in the fall of 1884, we must, therefore, investigate and ascertain what functions had been assumed and exercised by electric light companies, from the beginning of the business to the date of the passage of this ordinance. When we know what business was in fact done by the electric light companies from the inception of the business to the date of this ordinance, we then know, absolutely, what, at the time of the passage of the ordinance, was embraced in the expression, "general electric light business."

With this in mind, the complainant has gathered and spread upon the record in this cause, the facts with respect to electric light companies and the business assumed and performed by them, from the first installation of electric light plants. The installation and operation of the first electric

light plant in the world, at Menlo Park, New Jersey, is described in detail by the man in charge thereof. The first electric light system in a city of importance, was opened in London in 1882, and the man who installed and operated the same, has described the company and its functions and purposes. The man who drew the plans for the first distribution system of electric energy installed in the City of New York, has testified to the purposes and plans and functions of this company. The man who installed the first electric light system in Philadelphia in 1882, and has had charge thereof ever since, has testified to the operation of this plant and the business done by it. The various systems of electric lighting which had been perfected prior to the passage of this ordinance, and which were exhibited at the Electrical Exposition of the Franklin Institute in Philadelphia in 1884, are fully detailed and described by a witness who, at the exposition, was in charge of one of the exhibits. The literature upon the subject, showing the wide diffusion of information respecting the electric light systems and the functions performed by them, has been collated and spread upon the record in this cause. This includes scientific and popular publications, magazines and the daily press including the daily newspapers of the City of Omaha. And, finally, "the wizard himself," Thomas A. Edison, went upon the stand and described the functions of electric light companies and what was included within the electric light business from the very beginning.

Thomas A. Edison had perfected a system of electric lighting in 1879, and, in 1880, a complete plant for the operation and illustration of the various functions of the system was installed at Menlo Park, New Jersey, where Mr. Edison had his laboratory. This plant as it was operated in 1880, was fully described in the testimony of William J. Hammer (pp. 152-153 of the record). In this plant, electricity was generated at a central station, and carried by means of a distributing system of wires through the village of Menlo Park, and the energy so generated and distributed was utilized for lighting the streets as well as the buildings in the village, and also to light and operate a street car, and to operate machinery within the laboratory; the current was carried three-fourths of a mile from the laboratory where it was generated, to a building which was utilized as the first factory in the world for the manufacture of incandescent lamps. Here, all machinery used in the manufacture of electric lamps, was

operated by the electric energy furnished through the system aforesaid. Moreover, electro plating was extensively used in this factory in the manufacturing of these incandescent lamps, and the electric current generated and distributed from this central plant, was utilized in this factory by connecting the wires with the electro plating vats. Moreover, the meters registering the amount of energy utilized being placed often in cellars and exposed places, it was necessary that a normal temperature be preserved in the meters, and, consequently, an electric heating lamp was installed in each meter, controlled by a thermostat, so that the current would light the heater when the temperature went down, and the current be shut off when the temperature reached the desired point. As was said, an interesting detailed description of this plant, the first plant ever installed in the world for the operation of any electric lighting system, is found in the testimony of Mr. Hammer.

Thus, at Menlo Park, in 1880-1881, the first system of electric lighting ever installed, embraced as its functions, the generating and distributing of electric energy, and the electric energy so generated and distributed, was utilized in the production of light, power, heat and electro plating; and the plant and system were known and recognized and designated as the "Edison System of Electric Lighting." Mr. W. J. Hammer, the witness mentioned, was sent to England and installed and opened, at Holborn Viaduct, London, the first electric station for the generation and distribution of electric energy ever installed in any important city. Mr. Hammer, in his deposition (pp. 155-157 of record), describes this plant and testifies to the various devices whereby appliances utilizing electricity for power purposes, were used for the switching of current from one lamp to another. He also testifies that the company held itself out as delivering current to be used for power purposes; and to encourage manufacturers to utilize the current for power purposes, he gave exhibitions of the use of motors, showing how, from an ordinary current furnished by the plant, the dynamo, used as a motor, the revolving part, the armature, weighing about six tons, was run with perfect facility, and easily as fan motors are run today. The current was also utilized in connection with electric recording meters using motors, these being attached to the central distributing system. One of the first storage batteries ever made by Faure, was sent to this Holborn Viaduct sta-

tion, and from the electricity generated and distributed at this plant, the storage batteries were charged. So that, as the witness testified, this, the first electric light plant ever established in any city, not only contemplated, but provided for the supplying of electricity for light and power and other purposes. This plant, so installed and operated, providing for the furnishing of electric energy for light, power and other purposes, was owned and operated by a company named the "Edison Electric Light Company."

Mr. Hammer also drew the plans for the distributing system of the first electric light plant installed in the City of New York; he testified (pp. 153-154 of record), that a careful investigation was made before the plant was installed, of the business conditions of the territory to be occupied, and an estimate formed of the amount of energy which would probably be utilized for lighting, and the amount of energy which would probably be utilized for power purposes, and the copper in the wires of the distributing system was provided so as to carry current sufficient not only for the purpose of lighting, but also for the purposes of power. And the witness Mr. Holme (pp. 165-168 of the record), gives, from the books of the company which installed and operated this first New York electric light plant, a list of the customers who, in 1884, were actually utilizing the current generated and distributed by this company, for power purposes. This company so generating and distributing electric energy, utilized and intended to be utilized for power purposes as well as for the purpose of light, was named the "Edison Electric Illuminating Company of New York."

Mr. A. J. DeCamp, a pioneer in the electric light business, installed the first electric light plant in the City of Philadelphia and became and ever since has been the manager of the plant. He testified (pp. 177-178 of record), that, in 1884, the current, generated and distributed by his plant, was utilized not only for light, but also in the production of power; that the machinery in the plant of John Wanamaker was run by electric energy furnished by this company; and that Wanamaker & Brown, in their extensive clothing manufacturing plant, operated all their machines by electric energy taken from the wires of this company. The company so furnishing electric energy then being utilized in Philadelphia for power, as well as light purposes, was the "Brush Electric Light Company."

In September, 1884, there was held in Philadelphia, under the auspices of the Franklin Institute, an electrical exposition, international in scope, and embracing the very latest appliances for the operation and utilization of electric energy. Mr. William J. Hammer, already mentioned, was in charge, at this exposition, of all the Edison interests and exhibits. He describes the exposition in his testimony (pp. 157-161 of record). At this exposition, the four great systems of electric lighting which had been developed, were installed and in operation; one system was known as the "Thomson Houston System of Electric Lighting," one as the "Brush System of Electric Lighting;" another as the "Weston System of Electric Lighting," and the other was the "Edison System of Electric Lighting." All of these systems known and described as systems of electric lighting, exhibited at this exposition as a part of the function of the system, a motor or motors in operation, driving machinery; showing that, in each instance, the function of providing electricity for use in generating power as well as for use in generating light, was recognized and considered as a part of the function of the electric lighting system.

Mr. Thomas A. Edison testified (pp. 180-182 of record), that in 1880 he developed his system known as the "Edison System of Electric Lighting;" and that this system included, as a part thereof, the appliances for the utilization of electric energy for power purposes. He testified that the patents regarding appliances for the operation, distribution and utilization of electric energy for light and power purposes, comprising his system of electric lighting, were by him transferred to a company to commercially operate and handle the same, and that the name of this company was the "Edison Electric Light Company." He further showed that local companies were organized in a large number of places to install and operate central generating and distributing plants comprising the Edison System of Electric Lighting, and that these local companies were called by the name of the town, and the words "electric lighting" or "electric illuminating company" added. He showed that these local electric lighting and illuminating companies were licensed by the parent company, the Edison Electric Light Company, to utilize, in their business, all the appliances comprising the Edison System of Electric Lighting, which, as was said, included as a part thereof, motors and other appliances for the utilization of electric

energy for power and other purposes. He further testified to the installation and operation of the plant at Menlo Park, and that the system installed by the New York Illuminating Company was installed with a purpose to supply current for power, as well as for light, and that provision was made therefor in the first plans of the distributing system; and Mr. Edison, as well as Mr. Hammer and Mr. DeCamp, testified specifically that in the fall of 1884 and prior thereto, the words "electric light business" had a defined and well understood meaning, and that the expression meant "generating a current at a central station, and distributing it over wires to many customers for use for lighting and power purposes."

We have referred to the fact that Mr. Edison's patents for the appliances for the generation, distribution and utilization of electric energy for light and power purposes, comprising the Edison System of Electric Lighting were transferred to, and held by the Edison Electric Light Company, which licensed local electric light companies to utilize the machinery, covered by the patents, in the operation of their respective plants. A copy of this license is in the record (pp. 199-213). There is also, in the record (p. 192), a list of the local companies which, prior to the fall of 1884, had acquired, by license, the right to utilize these appliances for the production of electric energy and the utilization thereof for light and power. The license clearly shows that the local companies made provision, before they entered upon the construction of their plants, for the generation and distribution of electric energy and the utilization thereof for light and power purposes. And to show how general this knowledge, purpose and intention was, prior to the date of the passage of the ordinance in question, we introduced the said list in evidence. By this, it appears that prior to December, 1884, local illuminating companies of New York, Chicago, Chamokin, Pa., Sunbury, Pa., Lawrence, Mass., Tiffin, Ohio, Hazelton, Pa., Galveston, Texas, Piqua, Ohio, Circleville, Ohio, Cambria, Md., Ashland, Ohio, and Des Moines, Iowa, had acquired a right and intended to generate and distribute electricity for use in the production of power, as well as light.

Recognizing the fact that the state of an art, at any particular period, is often-times best shown by the current literature upon the subject, the complainant, in the deposition of William J. Jenks (beginning at page 289 of the record), has collated and presented from the scientific, govermental

and popular publications, the spread of knowledge respecting the art of generating and distributing electric energy and the utilization thereof for light, power, heat and other purposes. This deposition is full enough to be sufficiently comprehensive, and yet brief enough to be interesting as well as instructive. A reading thereof, will show how clearly appreciative the scientists were, of the usefulness of electric energy for the development of power, as well as light, and how, before any of the plants were actually installed, the function and purpose was clearly declared to be to utilize the current for power, as well as light. The wide-spread public comment, at the time the franchise was granted in New York, to the Edison Electric Illuminating Company, laid special and particular emphasis upon the fact that this illuminating company was to furnish power by day, as well as light by night. The installation and generation of the plant of Thomas A. Edison at Menlo Park, illustrating his system of electric lighting was widely commented upon in the public press, and special comment made upon the fact that the function of the plant was not only providing electric energy for lighting, but also for power and other purposes. At the time of the Franklin Institute exposition in September, 1884, wide public comment in the press spread the information that the electric light companies in their exhibits were displaying their capacity to perform the function of generating and distributing electric energy for power and heat, as well as for the purpose of producing light, and this was shown in the bulletins issued during the exposition.

The deposition of William J. Jenks, above mentioned, puts it beyond question, that there was, in December, 1884, general and wide-spread knowledge of the fact that the electric light business included, as a part thereof, the function of distributing current to be used for power purposes. But in addition thereto, the complainant has introduced in evidence (pp. 394-397 of the record), extracts from the daily newspapers of the City of Omaha, wherein, both in the news columns and in the editorial comment, attention is called to the fact that developments in the utilization of electric energy made it practicable for the same to be used not only for the production of light, but also for the production of power and for other useful purposes.

The complainant has also introduced in evidence, an article from Scribner's monthly magazine of February, 1880,

being a description of "Edison's Electric Light," and certified to by Edison as accurate and authoritative. The article is found on pages 424 to 437 of the record; and, in the article, on page 435 thereof, the application of electricity for power purposes in the operation of motors, was clearly stated.

In the Articles of Incorporation of the New Omaha-Thomson-Houston Electric Light Company (pages 446-449 of the record), the function of the company was not limited to the generation and distribution of electric energy, to be utilized for any one particular purpose. On the contrary, one of the functions of the company was stated in the article to be, "to construct lines of wire for the transmission of electric current from central stations, through such wires or otherwise." Thus the company recognized, as its function, the generation and distribution of electric energy, the consumer thereof, of course, being free to use it for any purpose desired.

We submit, therefore, that in December, 1884, when the ordinance in question was passed, the expression "general electric light business" included in fact and in practice, as was well known, the generation and distribution of electric energy, the same to be utilized for power and other purposes as well as for light.

The City of Omaha and the company operating the plant under the ordinance in question for more than twenty years, in carrying out the provisions of the ordinance, have uniformly placed a practical construction upon the said ordinance, interpreting the same to mean that the company had the right thereunder, to distribute electric energy to be utilized for power and other purposes.

Should any doubt exist as to whether, in fact and in law, the ordinance, as passed, granted to the company the right to distribute electric current for power and heat purposes, such doubt should be resolved in the light of the uniform practical construction placed upon the ordinance, in this regard, by the city and the company ever since the company installed its plant. Throughout all the intervening period until the passage of the resolution herein complained of, in all the dealings between the city and the company, and in all the acts of the city, under the said ordinance, in enforcing and carrying out its provisions, the city and the company

have always recognized that the company had the right, under the ordinance, to distribute energy to be utilized for power and other purposes.

The bill avers (p. 6 of the record), and the answer of the city admits (p. 126 of the record), that the company, ever since the installation of the plant, has held itself out, by public advertisement and by solicitation, as engaged in the business of generating and distributing to patrons, electric current for use by them for the production of light, power and heat, or for such other purposes as the same might be available. And until the passage of the resolution in 1908, no complaint or objection was ever made thereto, by the city.

Moreover, as soon as a customer could be obtained for current to be used for power purposes, the company performed the service of supplying the energy for that purpose; and, during all the intervening years, the original company and its assign have constantly and uninterruptedly supplied current to patrons using the same for the production of power, in ever increasing quantities. The bill sets forth specifically (page 13 of the record), a table showing the receipts of the company for current furnished for light and power, by years, from 1890 to and including the first six months of 1911. The correctness of this statement is established by the deposition of Mr. Holdrege (page 399 of the record); and an inspection of this table will show the constant and uninterrupted increase, from year to year, of the business done by this company, through this plant, in the distribution of electric energy to be used for power purposes. And the record contains (pp. 438-445 of the record), the list of customers using electric current furnished by this company for power purposes at the time of the resolution complained of. The list, of course, includes only those who have meters to register the current used for power purposes, and does not include the thousands of persons who, in their residences and elsewhere, use the current furnished, for the operation of electric fans and other light machinery.

The testimony also shows (deposition of Mr. Holdrege, p. 402 of the record), that the company, owning this plant, serves thereby, not only the City of Omaha, but also the Cities of South Omaha, Benson, and Florence, and the Villages of Dundee, Bellevue and Fort Crook, together with the Army Reservation and various places not in any incorporated village; and that, in addition thereto, the company sells

energy to the Nebraska Power & Traction Company, with which it operates its interurban street railway line, and which, in turn, it sells to the City of Papillion and the Village of Ralston.

There is thus, undisputed in the evidence, the constant growth of this plant from the beginning, and the wide-spread use made of the current furnished by this plant for power purposes. In the testimony of Minor R. Huntington (p. 407 of the record), of Arthur C. Smith (p. 410), Thomas C. Byrne (p. 413), C. L. Babcock (p. 415), Louis Kirschbraum (p. 417), Frank B. Johnson (p. 420), and of Mr. Holdrege (p. 397), the facts are detailed showing how, with the exception of the very large and heavy manufacturing plants, steam, as a motor power, has been gradually discarded in the City of Omaha, and the manufacturing plants of the city have been re-arranged and adjusted to the use of electric energy furnished by this company as a motor power. The deposition of Joseph McGuire (p. 331 of record), shows that the machinery of the Water Works Plant of the City of Benson is operated by, and is dependent upon, the electric energy furnished by this company as a motive power.

All this growth and development of the business of this company, in the distribution of electric energy used for power and other purposes, and the re-adjustment of all the manufacturing plants in the City of Omaha were, as above stated, entirely without any objection on the part of the City of Omaha or its officials.

Not only did the City of Omaha fail to object to the exercise, by the company, of its right to distribute electricity to be used for power and other purposes, but it actively and affirmatively recognized the right of the company to so act. This recognition was official, and constant, in the carrying out of the provisions of the ordinance itself.

The ordinance provided that the business of the company should be subject to such reasonable regulations as might be provided by the ordinances of the city. Under this, the city has passed numerous ordinances regulating the use of the streets and public places of the City of Omaha by the company, in the transaction of its business; and, in all this regulation, the ordinances specifically and definitely recognized the right of the company to distribute, through its system, electric energy to be used for power and heat purposes.

For instance, in December 1892, the city passed an ordinance number 3391 (Exhibit C. Bill of complaint, p. 30 of record), which defined the duties of the city electrician, and prescribed specific regulations and rules respecting the use of electric wires and appliances. These rules (p. 32 of record), divided the wires upon the streets into two classes, and contained the following provision: "Those used for electric lighting or transmission of power, belong to this (the second) class."

The ordinance then provided specific regulations and rules respecting the insulation and manner of connections of wires of the second class, and regulated the use of electric motors, and further provided that no connection with any wire of the second class should be made without permit from the city electrician by a person having a license therefor, and that such insulation and connection should be supervised by the city electrician and that reports of all such permits and inspection should be, by such city electrician, made to the city council. Under this ordinance, directly recognizing and regulating the use of electric wires used upon the streets not only for electric lighting but also for the transmission of power, thousands of connections were made between the wires of the company and the premises of consumers, where the current was to be used for power purposes, all of which connections were made under the permit and inspection of the city electrician and reports thereof were regularly made by the city electrician to the city council.

Again in March, 1894, the city passed an ordinance number 3791 (Exhibit "D" of the bill of complaint, p. 41 of record). By this ordinance, new and different regulations were provided for the inspection, insulation and connections with electric wires in the city; and it also provided (p. 43 of record), specific regulations respecting central stations for the generation of electricity for light or power; and also provided regulations respecting the insulation, mounting and wiring of electric motors. The ordinance further provides for the permit and authority of the city electrician as necessary to make all connections with the wires of the company with special provisions respecting those wires carrying current to be used for power purposes. Under this ordinance, thousands of connections were made with the wires of the company upon the streets of the city under the rules and

provisions of the ordinance, and in obedience to its requirements respecting connections where wires were to carry current to motors to be used for power purposes.

Again, in March, 1898, another ordinance regulating the manner in which the wires of the company should be placed and connections therewith should be made, was passed by the city, being ordinance number 366 (Exhibit "E" bill of complaint, p. 59 of record). Under this ordinance, it was provided: "Section 1. No electric current shall be used for illumination, decoration, power or heating, except as hereinafter provided." The ordinance specifically provided in Section 5 (p. 60 of record), that it should be unlawful for any corporation to erect any poles in the streets for the purpose of placing or stringing thereon "electric light or power wire, or to place any conductors for the carrying of electric energy for light, heat, power or any other purpose" without first obtaining a written permit and authority from the city electrician. The ordinance then provided specific regulations concerning such wires, and the connections therewith, and the fees for the permits, etc.

In all the work done by the company, after the passage of this ordinance, its provisions were fully obeyed, and many hundreds of permits for the placing of wires and connections therewith, where electric energy was to be carried for light, heat and power, were issued.

Afterwards, in March, 1902, the City of Omaha passed ordinance number 5051 (Exhibit "G" bill of complaint, p. 66 of record). This ordinance required "that all persons and companies owning, maintaining or operating electric wires or other wires in the City of Omaha in the district hereinafter defined for the transmission of electricity for light, heat and power, shall on or before the first day of May, 1903, place under ground all such wires." The ordinance required a map, plan and details of the wires to be placed under ground in said district and the method of so doing, to be filed with the city officials. The New Omaha-Thomson-Houston Electric Light Company, pursuant to this ordinance, furnished the city a map and plan of its wires carrying current for light, heat and power, and at a cost of $203,215.00, did place under ground, within the district of Omaha defined in said ordinance, all of the wires of said company which carried electric current used for light, heat and power purposes.

Afterwards, the City of Omaha, in December, 1904, passed an ordinance number 5433 (Exhibit "H" bill of complaint, p. 68 of record), whereby the district within which all electric wires for the transmission of electricity for light, heat and power, should be placed under ground, was enlarged; and, pursuant to this ordinance, the Omaha Electric Light & Power Company which theretofore purchased the plant in question, at a cost of more than $276,000, placed under ground within the enlarged district, all of its wires carrying current to be used for light, heat and power purposes.

It will be noted that in all of the ordinances passed by the city, under its reserved power of regulation over the wires and business of the company, there was express recognition of the fact that the wires of the company were used to carry current for light and for power and heat; and definite, precise and specific regulations relating to wires which carried current for power and heat were provided in the ordinances, and were obeyed by the company. Thus, in carrying out the original ordinance granting the right of way, the city and the company, through all the years, united in a practical construction of the ordinance to the effect that the "general electric light business" comprehended and included the function of the distribution of electric energy for the production of heat and power, as well as light.

Not only did the City of Omaha, in its regulatory legislation respecting the company, agree in the interpretation of the ordinance, as we have shown, but in other ways equally certain, the city manifested its interpretation of the ordinance in question as granting to the company the right of way over the streets for the transmission of current to be used for heat and power purposes, as well as for light.

In March, 1902, a contract was made between the City of Omaha and the New Omaha-Thomson-Houston Electric Company for the lighting of the streets of the city. (This contract is Exhibit "F" to the bill of complaint, p. 64 of record.) In this contract, it is provided among other things (p. 66 of record), that the company should pay to the city a sum equal to three per cent of its gross receipts from the business done within the city, exclusive of business done with the city. The payments were made under this contract by vouchers in which

the revenue from light services and that from power services alone were separately stated. The form of the voucher was as follows (p. 9 of record):

"The New Omaha-Thomson-Houston Electric Light Company
To A. H. Hennings, City Treas., Dr.
Address, Omaha, Neb.

1902 For 3% bonus on gross receipts for 1902, per contract.

Gross earnings for arc and incandescent light service, exclusive of business done with the city.....		$144,459.09
Gross earnings for power service		48,546.38
		$193,005.47
Amount uncollected for arc and incandescent service.	$2,234.90	
Amount uncollected for power service	1,307.37	
		$189,463.20
3%		5,683.90

Omaha, Nebraska.

Received, March 3, 1903, from the New Omaha-Thomson-Houston Electric Light Company Fifty-six Hundred Eighty-three and 90-100 Dollars in full for the above.

A. H. Hennings,
City Treasurer.
F. B. Bryant, Deputy."

Again, on April 12th, 1905, the City of Omaha and the Omaha Electric Light & Power Company, which then owned the plant, entered into a certain other contract for the lighting of the streets which contract is attached as Exhibit "I" to the bill of complaint (p. 69 of record). As a part of this contract the company agreed to pay the city a royalty of three per cent of certain of its revenues the provision being as follows:

> "In further consideration of the terms hereby agreed upon, the company hereby agrees to pay, during the term, to the city, a sum equal to three (3) per cent of its gross receipts from lighting and power business done within the city, not including any revenue derived from the said city."

Payments by voucher similar in form to the one above set forth, were duly made under this contract.

Not only has the City of Omaha, in its regulatory legislation, recognized the right of the company to transmit through its distributing system, electric current for light, heat and power purposes, and not only has it recognized such right in various contracts made with the company, but the city also, for years, has been actually a customer of the Omaha Electric Light Company, utilizing the current furnished by said company for power purposes. The City of Omaha, for years, has operated a plant with machinery known as the Asphalt Repair Plant, and also has operated another plant with machinery known as the Cross-walk Department. The City of Omaha regularly applied to the company for a connection with its wires, and for the delivery of electric energy at these plants to be used for power purposes in the operation of the machinery mentioned. The connections were duly made, and for years the City of Omaha has utilized electric current so furnished, for power purposes in the operation of such machinery, and has paid the company the price for current so used. Moreover, the City of Omaha, within the past two years, has installed electric passenger elevators in its City Hall and duly made application to the company for connection with its wires, and the delivery of electric energy for power purposes in the operation of said passenger elevators. The connections were made, and the current so furnished has been used by the city in the City Hall in operation of said passenger elevators; and the city today is utilizing the current delivered by the company, for power purposes, in the various methods above set forth. The fact that the city so applied for and uses the electric current furnished by the company for power purposes, is specifically averred in the bill (par. 31, p. 17, of the record), and the fact is admitted by the answer (par. 31, p. 134, of record).

Thus, clearly and comprehensively, we have established the fact that the city and the company, through a period of twenty years and more from the beginning of the operation of the plant, have united, in the system of regulation under the ordinance, in the making of contracts, and in the actual use of the electric current, upon a construction of the ordinance which clearly recognized the fact that the distribution of current for power and heat as well as light, was included in the "general electric light business" for the transaction of which the right of way over the streets was given by the ordinance.

This practical interpretation of the ordinance contract by both the parties thereto, throughout a long series of years, would, even if there were doubt originally as to its meaning, determine its true construction.

In *Insurance Company v. Dutcher,* 95 U. S. 269, this court said (p. 273):

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

The law of Nebraska is to the same effect, and the principle has been, in that state, applied to municipal corporations.

In *State v. Board of County Commissioners of Cass County,* 60 Neb. 566, the Supreme Court of Nebraska said (p. 573):

> "Where both parties to a contract, with knowledge of its terms, by their action under it, have given it the same construction it is generally a safe rule to adopt such construction. School District v. Estes, 13 Neb. 52; Hale v. Sheehan, 52 Neb. 184, and cases therein cited."

In *School District v. Estes,* 13 Neb. 53-54, the court said:

> "The parties themselves, with a full knowledge of the terms of the contract, having united and fully agreed as to its proper construction, and there being a possible doubt as to its meaning, the court did right in adopting that construction as the proper one in estimating damages for its violation."

In the case of *Columbia v. Gallagher,* 124 U. S. 510, this court applied the principle to a contract with the District of Columbia.

In the case of *Chicago v. Sheldon,* 9 Wall. 50, this court applied the principle to the interpretation of an ordinance by which the right to construct the railway was granted by the city to the street car company. The court said (p. 54):

> "What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23rd of May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company. Nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling influence."

The same principle is applied to the construction of ordinances granting rights in the streets to public service companies, in the following cases:

Port of Mobile v. Louisville & N. R. R. Co., 84 Ala. 115;

Mayor, Etc., of City of New York v. Starin, et al., 106 N. Y. 1;

Clark's Run & S. R. Turnpike Co. v. Commonwealth, 96 Ky. 525 (29 S. W. Rep. 361).

In determining the proper meaning of a statute, the courts are agreed that the construction given thereto by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons:

United States v. Moore, 95 U. S. 763;
United States v. Hill, 120 U. S. 180;
Brown v. United States, 113 U. S. 570;
United States v. Burlington R. R. Co., 98 U. S. 341.

"Tell me" said Lord Chancellor Sudgen, "what you have done under a deed, and I will tell you what that deed means." (*Attorney General v. Drummond*, 1 Dru. & Wall. 353, affirmed on appeal in *Drummond v. Attorney General*, 2 H. L. Cases 837.) This statement of the Lord Chancellor is now a maxim in the construction of contracts.

Upon this point see an exhaustive opinion by Bliss, J. in *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121, where he says:

> "Nor should any regard be paid to loose declarations or equivocal or isolated acts, but the *continuous conduct of the parties for a series of years* concerning the subject matter of the contract, and in fulfillment of its conditions—every act pointing in the same direction—may make their understanding as clear as by the greatest precision of language."

III.

The City of Omaha, by its legislation and acts during twenty years, having encouraged the Company owning the plant in its claim of right to distribute current in Omaha to be used for power and heat purposes, and having encouraged the Company to large expenses in providing equipment to so operate the plant, and having encouraged the manufacturers throughout the City of Omaha in large expenditures in discarding steam as a motive power and in adjusting their plants and machinery to the use of electric current furnished by said Company as a motive power, is now estopped to deny the right of said Company to distribute through its system, electric current for power purposes, as and to the extent it was doing when the said resolution was passed; and such is the settled law of Nebraska as announced by its Supreme Court in a series of decisions which constitute a rule of property.

Even though the acts and conduct of the city and the company, above detailed, through twenty years, were not held to amount to a practical construction of the ordinance, nevertheless, by virtue of said acts and conduct, the City of Omaha is estopped to deny the right of the company to distribute current through its system for power and heat purposes as it was doing when the resolution was passed.

The facts have been sufficiently detailed. It remains only to show that, by virtue thereof, under the law of Nebraska, the city is estopped as claimed, and that the company has acquired an equitable right to do the business it was doing, which right the city is powerless to take away.

State v. Lincoln Street Railway Company, 80 Neb. 333.

This is the first of a series of decisions by the Supreme Court of Nebraska upon this point. That case involved the right of the Lincoln Street Car Company to operate street cars upon the streets in the City of Lincoln. The law of Nebraska required, as a condition precedent to the grant of a right to operate a street car system upon the streets of Lincoln, that the affirmative vote of the people be cast upon a proposition submitted to them, defining the termini of the proposed lines. The Lincoln Street Car Company submitted a proposition in the form of a blanket proposition giving, as termini, the ends of each north and south and east and west street of the city; on this an affirmative vote was cast. The company under this vote constructed various lines of track

upon various portions of certain streets of the city, and was engaged in operating the same. The city claimed that the proposition voted on was illegal and that the vote conferred on the company no right to use the streets. Proceedings in *quo warranto* were begun to oust the company from the use of the streets.

The Supreme Court of Nebraska, following the opinion of Mr. Justice Lurton, then Circuit Judge, in *Mayor v. Africa*, 77 Fed. 501, held that the blanket proposition was absolutely illegal and that the vote thereon conferred no right upon the company. The court, however, noticed the fact that, after the vote, the company, with the consent of the city, constructed and operated lines of street railway upon certain portions of certain streets of the city. The court then took up the question as to the effect of the consent of the city to this construction and operation, and said (pp. 345-346 and 351):

> "The most that can be claimed from the permission obtained from the electors of the city of Lincoln by the several street railway companies is the right to enter upon such streets of the city, within a reasonable time after such permission was granted, as they thought best to occupy with their lines of road. So far as these lines have been constructed we think the defendant may claim an easement over the streets occupied, but the blanket license under which the defendant claims the right to extend its lines or to go upon other streets must be denied.
>
> "As to the constructed lines, it would be manifestly unjust not only to the defendant, but to the holders of its securities, to now oust it of rights and privileges which it and those through whom it takes title have been claiming and exercising for years with knowledge and acquiescence on the part of the state. The state, like individuals, may be estopped by its act, conduct, silence and acquiescence. * * * Our conclusion is that the Lincoln Traction Company is the owner of the constructed lines of street railway of which it is now in possession, and that it has right and authority to maintain and operate the same, that its purchase of the lines formerly owned by the Lincoln Street Railway Company does not invest it with right or

> power to extend its lines, or to take possession of streets, or parts of streets, not now occupied by its completed lines, and that such extensions cannot be made, except by proceeding as required by law to obtain an additional franchise for that purpose and the consent of the electors of the city to such extensions as it may desire to make and such new lines as it may propose to construct."

State, ex rel., etc., v. Citizens' Street Railway Company, 80 Neb. 357, is the second case wherein this question is discussed. The case presents facts entirely similar to those presented in the case of *State v. Lincoln Street Railway Company, supra*. After stating that the blanket proposition voted upon was illegal, and that the consent given by the vote thereon, was of no avail when questioned by proper authority, the court say (pp. 360-361):

> "While the statute must be followed in all essential particulars in order that the consent of the electors of the occupation of the streets of the city by a railway company shall be valid and beyond recall, it does not follow that an irregular exercise of the power possessed by the electors is absolutely void and wholly without force. The manner in which the question of the consent of the electors of the city was submitted was clearly irregular, and the affirmative vote cast thereon just as clearly conferred no power upon the railway companies to use the streets of the city beyond the time when that right should be questioned by some proper authority. But we are not prepared to say that, where the companies acted in good faith and expended their money in the construction of lines under a supposed right to occupy the streets, and this right was not questioned until the bringing of the present action, they or those claiming under them should be ousted from the possession of such streets as are now occupied by their lines, and their property rendered worthless. Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to

confer, such irregularity renders all proceedings under the vote void and of no effect. * * * It is also claimed by the state that the City of Lincoln did not acquire the franchise or consent of the electors held by the Home Street Railway Company by the foreclosure and sale in the Federal Court. We think the rule quite well established that a franchise to be a corporation is separate and distinct from a franchise as a corporation to maintain and operate a railway. The latter may be mortgaged without the former and passes to a purchaser at a foreclosure sale. Morgan v. Louisiana, 93 U. S. 217. The consent of the electors to the occupation of the streets of the city, if a mere license, was a license coupled with an interest, and such licenses, it is well settled, are assignable. *Sawyer v. Wilson*, 61 Me. 529; *Wiseman v. Eastman*, 21 Wash. 163; *Heflin v. Bingham*, 56 Ala. 566."

Omaha & Council Bluffs Street Railway Company v. City of Omaha, 90 Neb. 6, is the latest decision of the Supreme Court of Nebraska upon the question now under discussion. The decision was rendered October 6th, 1911. The case is peculiarly pertinent to the present issue. This was a suit in equity begun by the Street Railway Company against the City of Omaha, to restrain the City of Omaha from enforcing a resolution directing the cutting of wires of the street railway, which is identical with the resolution the object of the present suit. The evidence showed that, for a number of years, the Street Railway Company had furnished to various parties in the City of Omaha, from its wires, electric current which was used by said parties for power purposes in the operation of machinery. The various regulatory ordinances, hereinabove specifically referred to, respecting insulation and connections with wires carrying current for power purposes, as well as the said ordinance requiring all wires carrying current used for light, power and heat purposes to be placed under ground, were applied to and obeyed by the Street Railway Company in respect to its wires which carried current used for power purposes as stated. When the resolution directing the city electrician to cut all wires carrying current for power purposes was passed in 1908 as above set forth, the Street Railway Company filed a bill in the District Court in Douglas County, Nebraska, setting up the above

facts claiming that the City of Omaha was estopped by its acts and conduct from denying the right of the Street Railway Company to serve the parties they were then serving with electric current to be used for power purposes. The city answered, contesting the claim of estoppel. The District Court entered a decree finding that the city was estopped, as claimed, and enjoining the enforcement of the resolution. The case was taken to the Supreme Court of Nebraska by the City of Omaha, and the decision cited was rendered on such appeal.

The Supreme Court, in its opinion, reviewed the various ordinances and acts of the city, in regulating electric wires, which we have particularly referred to, and which need not be again recited. The Supreme Court held the city estopped. It modified the injunction granted by the lower court so as to change it from a perpetual injunction, to one which would last until the expiration of the Railway Company's franchise. The court announced its conclusion, as follows (pp. 13-14):

> "We are therefore of opinion that the general finding of the District Court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy plaintiff's property and business, which it has thus fostered and encouraged, without compensation, and also deprive the interveners of their contractual rights therein.
>
> "A like question was before us in the case of *State v. Lincoln Street R. Co.*, 80 Neb. 333, where it was said: 'The courts, in a proper case, will apply the doctrine of laches to a case in which the

state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter.' This is a well-recognized rule of equity, and is supported by *City of Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224; *Chicago & N. W. R. Co. v. West Chicago Park Commissioners*, 151 Ill. 204; *Village of Winnetka v. Chicago & M. E. R. Co.*, 204 Ill. 297; *City of DeKalb v. Luney*, 193 Ill. 185; *Spokane Street R. Co. v. City of Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *Town of New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18; *City of Sioux City v. Chicago & N. W. R. Co.*, 129 Ia. 694; *Gregsten v. City of Chicago*, 145 Ill. 451; *People v. City of Rock Island*, 215 Ill. 488. We deem further citation of authorities in support of this rule unnecessary. We are of opinion that the facts of this case bring the defendants within the rule of *State v. Lincoln Street R. Co., supra*, and therefore, the judgment of the District Court should be affirmed."

These decisions by the Supreme Court of Nebraska, determining the equitable rights in the streets of the cities of that state with which corporations are invested, upon the ground of estoppel, whenever a city, by acquiescence as well as by active participation encourages the company in the expenditure of large sums of money in installing and operating a plant under a belief that it had a right so to do, became and are rules of property; and, as a rule of property, the Electric Light Company is entitled to its protection and application in this case. As a rule of property, this complainant, possessing as security for the bond-holders, all the rights of the Electric Light Company, is entitled to its protection and application in this case. We have, in the record in this case, all of the acts and doings of the City of Omaha relating to our business, which the Supreme Court of Nebraska used as a basis for its decision in the Omaha Street

Railway Case, *supra*. In addition to all those facts, we have the contracts entered into, and the act of the city in becoming and remaining a customer of the company for electric energy to be used for power purposes. Clearly, therefore, under the laws of Nebraska, the City of Omaha is estopped to enforce the said resolution as against the company or this complainant, and is estopped to deny the right of the company and this complainant to furnish electric current to be utilized for power and heat purposes, to the extent to which such business was carried on at the time of the passage of the resolution complained of.

* * *

We have discussed the two issues presented for decision in this case, and have, we submit, demonstrated that the right of way over the streets of Omaha under the ordinance, was granted in perpetuity; and, further, under every rightful construction of the ordinance, the grant of the right of way was for the purpose of the distribution of electric current to be used for purposes of power and heat, as well as light, and that such is the true interpretation of the expression "general electric light business." We have shown that, before the bonds issued by the company, were purchased, the purchasers made investigation and had personal knowledge of the business done by the company; they knew that the company was engaged, with the consent, approval and participation of the city, in the business of generation and distribution of electric current for use for light, power, heat and other purposes; they knew the revenues of the company and the sources from which the revenues came; they knew that the manufacturing establishments of Omaha, with few exceptions, had been adjusted to the use of electric current furnished by said company as a motive power, and were so using such current; and they were advised by the opinion of their counsel, that the franchise of the company was unlimited in time. With knowledge of, and in reliance upon all these facts, these bonds, of which now more than $2,000,000 are outstanding, were purchased.

When the resolution of the City Council was passed in 1908, and even after the decision of the United States Circuit Court dismissing the suit brought by the Omaha Electric Light & Power Company, the bonds were not seriously

affected, so great was the confidence of the investors in the opinion of their counsel. The company was well managed, and the bonds were a choice investment and sold at more than par. When the decision of the Court of Appeals was rendered, however, the situation was changed; even though the litigation was not ended, the effect of that decision was to completely destroy the saleability of the bonds. These bonds were forthwith omitted from the circulars in which were listed saleable bonds recognized as good investments. From a case of a ready sale at more than par, the bondholders found no sale whatever for their bonds, excepting only in a few instances where a small number were sold at 90 cents on the dollar to persons willing to speculate therein. Thus with ten per cent of their market value destroyed, and practically no market for the bonds at any price, a situation was presented, whereby the trustee for the bondholders was justified in instituting this suit, by filing the bill, in order to protect and preserve the rights, under the ordinance, which the trustee held as security for the bonds. To that end, this suit was brought.

IV.

The decision in the case brought by the Omaha Electric Light & Power Company, cannot affect the decision in this cause, since neither the bondholders nor their trustees, were parties to that litigation, and hence they are not concluded thereby.

Keokuk & Western Railroad v. Missouri, 152 U. S. 301.

In this case this court said (pp. 313-314):

> "There was no such privity of estate between the defendant in the suit, namely, the Missouri, Iowa and Nebraska Company, and the defendant in this suit as makes the judgment in that case *res adjudicata* in this. The mortgage of the Missouri, Iowa and Nebraska Railway Company, under the foreclosure of which this defendant purchased this road, was executed June 1, 1870, and neither the trustee under that mortgage, the Farmers' Loan and Trust Company, nor the bondholders, whom this mortgage secured, were parties to that action, which was begun in 1873 to recover the taxes of 1872. While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree. A leading case on this point is *Campbell v. Hall,* 16 N. Y. 575, in which it was held that a second mortgage of land was not estopped by a judgment in an action between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but might litigate the amount due upon the first mortgage, notwithstanding the judgment. Speaking of the rule that a grantee is estopped by a judgment against his grantor, because he holds by a derivative title from his grantor, and cannot, therefore, be in a better situation than the party from whom he obtained his right, the court ob-

served: 'This being the reason for the rule, it follows that it can have no application except where the conveyance is made after the event out of which the estoppel arises. The principle in such cases is that the estoppel attaches itself to and runs with the land. The grantor can transfer no greater right than he himself has, and hence the title which he conveys must necessarily be subject, in the hands of the grantee, to all the burdens which rested upon it at the time of the transfer. On the other hand, nothing which the grantor can do or suffer to be done after such transfer can affect the rights previously vested in the grantee.' See also *Mathes v. Cover*, 43 Iowa 512; *Bryan v. Malley*, 90 N. C. 508; *Scates v. King*, 110 Illinois 456; *Dooley v. Potter*, 140 Mass. 49; *Coles v. Allen*, 64 Alabama 98; *Todd v. Flournoy*, 56 Alabama 99; *Shay v. McNamara*, 54 California 169."

In *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, the court said (pp. 298-300):

"The questions involved are as to the extent, validity, and duration of the contract rights of the Cincinnati Inclined Plane Railway Company under which it occupies with its tracks, poles, wires and other equipment, certain streets of the City of Cincinnati, and upon which it maintains and operates a street car line. That these street easements originate in certain statutes of the state of Ohio and certain ordinances of the City of Cincinnati does not affect their character as contracts entitled to the protection afforded by the Constitution of the United States. The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires, and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights. Such a grant, as we had occasion to decide in *Detroit Citizens' St. Ry. Co. v. City of Detroit*,

22 U. S. App. 570-580, 12 C. C. A. 365, 372, and 64 Fed. 628, 635, may be for a term longer or shorter than the corporate life of the company receiving it, the duration of the estate being dependent upon the terms of the grant and the power of the grantor to make it. We then said that there was 'nothing in the nature of the property rights involved in a grant of an easement in the streets for street railway uses which distinguishes it from other property acquired by a corporation in the exercise of its franchises.' In *Railroad Co. v. Delamore,* 114 U. S. 501, 5 Sup. Ct. 1009, it was held that a grant by a municipal corporation to a railway company of a right of way through certain streets of the city, with the right to construct its railway thereon and maintain and occupy them in its use, is a franchise which may be mortgaged, and would pass to a purchaser at a sale under a foreclosure of the mortgage. There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which would prevent such easements from passing to a purchaser at foreclosure sale. It therefore follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly impeaching their validity and duration without being made a party thereto. It is true that a grantor can transfer no greater estate or interest than he has, and that the title in the grantee's hands must be subject to all the burdens and limitations which rested upon it at the time of the conveyance. But in *Keokuk & W. R. Co. v. Missouri,* 152 U. S. 301-314, 14 Sup. Ct. 592, 597, Mr. Justice Brown in delivering the opinion of the court, said:

'While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to

represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree.'

See also *Campbell v. Hall*, 16 N. Y. 575; *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590; *Trust Co. v. Folsom* (decided by this court at this term), 75 Fed. 929.

"The mortgage under which the complainant is the trustee was executed before the suit in the state court was begun, and we think there is no reason why a mortgage of property interests, such as the street grants claimed by the mortgagor company, should be concluded by a decree to which only the mortgagor was a party, than if the mortgage had been on a different character of estate. *Baltimore Trust & Guarantee Co. v. Mayor, etc., of City of Baltimore*, 64 Fed. 153."

* * *

The ordinance in question, passed by the City of Omaha, when accepted, became a contract binding both upon the city and the company. It is important to the financial interests of these investors, that the binding force of this contract be declared and maintained. It is vastly important that it be understood that municipal corporations and the public are, like individuals, subject to law, and bound by their contract obligations. To public corporations as to private, we can apply the words of Mr. Justice Brewer quoted by this court in *Union Pacific R'y Co. v. Chicago, etc., R'y Co.*, 163 U. S. 604:

"It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."

The fact that the direction to cut the wires of the company was by resolution instead of by ordinance, does not change its character as legislation. No charter provision limits the power of the city in this regard to proceeding by ordinance. A resolution like an ordinance is legislation. This has been decided by the Supreme Court of Nebraska (*McGavock v. City of Omaha,* 40 Neb. 64), and has been recognized by this Court. (*Board of Education v. DeKay,* 148 U. S. 591).

The action of the City of Omaha in passing the resolution in question, was legislation which, in substance and legal effect, is a state law which impairs the obligation of the contract shown to have resulted from the passage of the ordinance number 826, and the action of the parties in interest thereunder, and such resolution as a law is unconstitutional and void for the reason that the same violates the provisions of the Constitution of the United States.

We submit, therefore, that the decree of the lower court in this cause should be reversed, and that a decree be ordered granting a perpetual injunction against the enforcement of the resolution as prayed in the bill.

Respectfully submitted,

WILLIAM D. MCHUGH,
Of Counsel for the Old Colony Trust Company, Appellant.

SUBJECT INDEX.

ALPHABETICAL INDEX.

In the Supreme Court of the United States.

OLD COLONY TRUST COMPANY,
Appellant,

vs.

THE CITY OF OMAHA,
Appellee.

No. 754.

BRIEF ON BEHALF OF APPELLEE.

I.

The appellee challenged the sufficiency of appellant's bill to charge a cause of action against it. (p. 141, record). It again challenges the right of appellant to institute and maintain this action:

First: Because appellant has failed to plead sufficient in its bill and to prove sufficient in this case to authorize either the institution or the prosecution of this suit.

At page 76 begins a series of exhibits relating to the express trust imposed upon and assumed by appellant by virtue of the transactions and dealings between appellant and the electric company. The first part of these trust instruments relate to recital of certain things as having occurred, sets forth a copy of the bond and

coupon secured by the trust deed and a more or less detailed description of the property mortgaged, including the mortgage conveyances. Then follows a great number of articles, providing in detail the electric company's rights in and to the possession of the property and fixing the trustee's rights with respect to the property, as well as its authority and powers over and concerning the management and the care of the mortgaged property, including a great variety of detail having no particular bearing on the matters to which the appellee, in this connection, desires to call the court's attention. At the close of page 82 of the record and at the beginning of page 83, it is provided as follows:

> "And it is hereby declared and agreed that all the bonds secured or to be secured hereby shall be certified, delivered and issued, and that the mortgaged premises shall be subject to the following further provisions and agreements, to wit:
>
> "Article 1. So long as the electric company shall observe and perform all and each of the promises, terms and provisions in the bonds and coupons and in this mortgage contained, it may (a) retain the possession of, and use and enjoy, the mortgaged premises without let or hindrance from the trustee, except, etc. * * *"

Then follows certain exceptions. Article 2 then follows and is subdivided under paragraphs designated respectively (a), (b), (c), (d) and (e). Paraghaph (a) provides against defaults in the payment of principle and interest of the bonded indebtedness, and authorized the trustee in the event that such default should continue for 60 days to take action such as is hereinafter noticed. Paragraph (b) provides against default in the payment of the taxes and assessments and authorized the trustee in the event of default in payment of the same, to continue for 60 days, to take action such as is hereinafter

noticed. Paragraph (c) requires the electric company to execute and deliver to the trustee any such further deeds and conveyances as may be required, and authorized the trustee in the event of the failure so to do by the company, to take action such as is hereinafter noticed. Paragraph (d) exacts of the electric company the observance and performance of all things required under the bonds and coupons, and in the event of the company's failure for 60 days so to do, the trustee is authorized to take action such as is hereinafter noticed. And paragraph (e) follows:

> "(e) In case the electric company shall do or omit to do any act or thing whereby it shall loose or forfeit any licenses, rights, privileges or franchises necessary to enable the company to operate and maintain any substantial portion of its electric plant or the lines of other property. * * *"

Then follows a recital of such actions or steps which the trustee is authorized to take, in the event of the happening of any of the events or things required of the electric company by the several paragraphs of Article 2. The authority is given in these terms:

> "Then and in any such cases the Trustee may, in its discretion, and, upon being requested in writing by the holders of more than one-fifth of the bonds at the time outstanding secured by this mortgage, and being furnished with sufficient funds for the purpose or indemnified to its reasonable satisfaction, it shall be its duty to take all needful steps for the protection and enforcement of the rights hereby secured to it as Trustee for the holders of said bonds and coupons. To this end exercising the power of entry or sale herein conferred, or both or taking proper judicial proceedings by action, suit or otherwise,

> as the Trustee being advised by counsel, shall deem best in the interest of the bond holders. The Trustee's decision as to which of the remedies herein provided, or of those provided by the laws of the state wherein the mortgaged premises may be situated, it shall adopt shall be conclusive."

The trustee evidently brings this action and assumes its rights to maintain it on the claim that the electric company has violated the provisions of the trust embodied in paragraph (e) of Article 2, (p. 83, record). In its bill it has complained of the violation of the trust in no other respect, all interest on the bonds has been paid, all taxes paid and all conveyances executed as requested.

In paragraph 42 of its bill, (p. 25 of the record), and pleading with reference to the bill which the Omaha Electric Light and Power Company had filed in its case against the city to restrain the enforcement of the concurrent resolution in question, it is said:

> "Your orator further avers that in said bill and in the testimony offered in support thereof, important facts essential to the proper determination of the rights which your orator as trustee as aforesaid acquired from said Omaha Electric Light and Power Company and still possesses as herein shown to the use of the streets, alleys and public places of the city of Omaha, were not set forth or brought to the attention of the court. * * * And your orator avers that it is necessary for it, in order to protect the rights of the parties whom it represents as herein set forth, to institute and prosecute this its separate action."

In the 36th paragraph of its bill, at the close thereof (p. 22, record), it is averred: "By the terms of said trust deed your orator is given power to protect said mortgage security by any proper suit or action."

At page 111 and following pages of the record, the bill of the Omaha Electric Light and Power Company against the City of Omaha and another is set forth. An examination of that bill and comparison of it with the bill of the appellant herein discloses conclusively that nothing of importance to the proper determination of the issues involved concerning the litigation in relation to the said concurrent resolution, is omitted from that bill or contained in the bill of appellant. The bill of appellant may contain a more or less amplified statement of the bill of the electric company. A comparison of the testimony offered to support the averments of the bill of the electric company in said case with that offered by the appellant in the instant case likewise conclusively shows that nothing essential was omitted from the one and included in the other; and a comparison of the briefs filed in the two cases now before this court again conclusively show that the issues presented in each are identical; outside, of course, of those issues which arise by reason of the different relations sustained by the different parties to the property in question, such as owner of the property and such as trustee for the mortgage holding creditors.

Therefore, it is apparent that the electric company did nothing or omitted "to do any act or thing" whereby it lost or forfeited any license, rights, privileges or franchises necessary to enable it "to operate and maintain any substantial portion of its electric plant or lines or other property." On the contrary, the record before this court conclusively shows that that company did everything in its power legally possible to be done to protect and maintain its property, and omitted to do nothing which it legally and properly could have done, for the preservation thereof. Consequently the conditions of the express trust necessary to authorize interference by the trustee or suit or action upon its part have

never arisen, and under said trust instrument and under its provisions, appellant was without authority to institute the action and is without authority to maintain it.

It is further to be observed that the provisions of paragraph (e) of Article 2, heretofore quoted are not violated simply because the electric company was unable to sustain its contention against the city and, therefore, suffered a loss of a part of the claimed rights. It was enough for the electric company to do all that it could lawfully do to prevent the losses threatened by the resolution. This was all that the instrument required of that company. It was all that could be required of it. When it acted promptly, as it did and brought its injunction proceeding to prevent the enforcement of said resolution, it did all that it could do and all that was required of it to prevent a violation of the performance of said article. This provision was never intended as an insurer of results, but its provisions were for the purpose of assuring vigilence on the part of the company and care and attention to its interest commensurate with the respective rights of the parties in the property. This was all that was intended, all that could have been intended. Suppose, for instance, the trustee had filed its action against the enforcement of said resolution before it was possible for the electric company to have filed its action, yet the electric company was diligently preparing and would have filed its action, in due time to test the rights claimed against the enforcement of said resolution, would it be contended that the trustee was authorized to file that suit or to maintain it, under the provisions of the trust instrument? Carrying the illustration forward, suppose the trustee in its action had filed the same bill as that filed by the electric company, verbatim et seriatim, would it be contended that the trustee would have a right to institute and maintain such action? This last in legal

effect and consequence, is exactly what is attempted to be done herein.

Doubtless if the electric company had brought no proceedings to protect its interest, then the trustee under said provisions of the trust would be authorized to take the proper and necessary steps in that repsect. It may be if the bill filed by the electric company had failed to state a cause of action, then the trustee would likewise be authorized to take such steps and institute such proceedings as might be appropriate to test the right of the city to enforce said resolution.

Moreover, it is to be observed further that under the trust instruments, mortgages and conveyances, the electric company became, was and continued to be the agent of the trustee and bond holders, for the protection of the property mortgaged and required thereby and for and on behalf of the trustee and its bond holders to institute, maintain and prosecute whatever proceedings, actions and suits as might be necessary fully to protect the mortgaged property from injury or dismemberment. The trustee, therefore, and its bond holders were in privity with the electric company and bound by the results of the litigation which the company might institute or to which it might be a party, required of it to institute or to be a party by the trust instrument, and having for its purpose the protection of the mortgaged property from impairment or dismemberment.

Article 13 of the trust instrument (p. 89), among other things provides:

> "That it," meaning the electric company, "will not suffer or permit any default to occur under this mortgage, but will faithfully observe and perform all the conditions and requirements thereof."

Article 14 (p. 90 of the record), among other things, provides:

> "And that it will diligently prosecute its business and do everything that lies in its power to preserve, maintain and renew the rights, privileges and franchises appertaining thereto."

Therefore, it is apparent that the mortgage deed vested the property and its possession in the trustee for the use of the bond holders and that by other provisions of the trust instrument the electric company had the property recommitted to its possession upon condition that its possession should continue only upon the proper observance of certain specific acts and things required of it as a condition to continue possession. That of the things required of it to do and perform were such actions and proceedings as might at any time become proper and necessary to protect the property against loss or injury. In other words, it became for these purposes the agent for the trustee and its bond holders with express authority to institute and maintain action looking to the protection of the property. Of this relationship, and the resultants therefrom we shall have more to say in another part of this brief.

We again urge for the reasons heretofore stated that the appellant ought not to be permitted to prosecute this action.

Second: The trustee for the bond holders, assuming that it has been authorized to act for them and to bring this action, is not entitled to maintain this suit unless it has pleaded and has proved that the securities which it holds in trust for the bond holders have been impaired or are likely to be impaired by the action of the city concerning which it complains. In this action, there has been a total want of proof to show impairment of the

securities to an extent where any possible injury will result to the bond holders.

In paragraphs 36-40 inclusive of its bill (pp. 21-24, record), it is charged that if the threatened action of the city is carried out the equipment and physical property of the company will be rendered of comparatively small value and wholly insufficient to secure the bonds; that the company's property and assets will be rendered of comparatively small value and will be wholly insufficient to secure the bonds outstanding; that the threatened action of the city will produce enormous losses to the power customers of the company and to the public; that it will produce great and irreparable loss and damage to said company and its bond holders; that it will destroy or depreciate the value of the property of the company situated in the city of Omaha, and will make the security for the bonds wholly inadequate and greatly depreciate the market value of the bonds. Will give rise to a great multiplicity of suits. Will deprive the trustee and the bond holders of a large and necessary portion of the mortgaged property; will impair the obligations of contract; and will constitute the taking of private property without compensation and without due process of law.

As to the possible loss or injury to the public, the power consumers and the company, the trustee and the bond holders have no concern. The public is not complaining, the power consumers are not complaining and the law does not permit the trustee to constitute itself a volunteer champion of such interest. As to the other averments above set out with reference to the impairment of the security held by the trustee, we want to say that there is an utter failure of proof on its part of any impairment to these securities resulting from the action of the city complained of.

This suit is one to enjoin the enforcement of Con-

current Resolution No. 2330, set out in paragraph 37 of the bill (pp. 22-23, record). Such is the purpose of the suit as shown on page one of the brief of the appellant. The complaint of injury or threatened injury must relate solely to those inquiries arising or to arise from the enforcement of the provisions of that resolution. The enforcement of that resolution and its attending evils, as claimed, constitute the sole issue in this action.

The resolution in question simply provided for the discontinuance of the wires and service employed in distributing current to produce power and heat, in the City of Omaha. It did not direct the removal of the wires, apparatus and service employed in distributing current in the production of light, in the City of Omaha, or any of the services or apparatus outside the City of Omaha. The incidental employment of current and apparatus in the production of power, but which is mainly employed for lighting purposes was not affected or intended to be affected by the provisions of the resolution in question. All the machinery, distributing appliances and property so employed and used, and all the revenues and earning from such sources in the City of Omaha, and all the property and appliances of the company and all the revenues and earnings from all sources outside the City of Omaha, were not threatened, affected or impaired by the provisions of said resolution.

The Circuit Court for the District of Nebraska dismissed the action of the Omaha Electric Light and Power Company against the City, for want of equity, based upon a finding and determination that the franchise granted the company did not authorize it to distribute current in the City of Omaha distinctly and solely for power and heat purposes. When this case reached the Circuit Court of Appeals, that court affirmed the decision of the lower court. It is true that it gave other reasons

for its affirmance of the lower court than those given by the lower court for its decision. But it decided nothing more or nothing different than the lower court had decided. Both decisions deciding simply that the city had the right to enact and enforce the provisions of the concurrent resolution. This was the only issue which could have been decided and which was presented in that case. It was not decided by the Circuit Court of Appeals nor was it attempted to be decided by that court that the company was without right or authority to distribute current for lighting purposes in the City of Omaha, or to distribute current for all purposes outside the City of Omaha. The city has by no act undertaken or even threatened to prevent the company from continuing to distribute current therein for lighting purposes and to continue the enjoyment of the revenues and earnings from such sources.

The mere fact that the Circuit Court of Appeals may have given reasons for its affirmance of the decision of the lower court, which, if availed of by the city, would enable the city to force a discontinuance of services for all purposes, constitute no sufficient or valid complaint to the appellant in this action. The city has not threatened or undertaken to compel the company to discontinue distributing current for light purposes and until that time arrises, there is no basis for a complaint other than those furnished by the enforcement of the provisions of the concurrent resolution. If the appellant herein desired to be in a position to question the reasons which the Circuit Court of Appeals may have given for its affirmance of the decision of the lower court, it should have become a party to that litigation, having had abundant opportunity so to do. It is simply erecting a straw man and then proceeding to burn him down. If the appellant can not trace the injuries or threatened injuries

complained of to the enforcement of the concurrent resolution in question, then it has failed to sustain its cause of action, and is entitled to no consideration.

The plain simple truth of the matter seems to be that this suit was instituted and is being prosecuted by the appellant for the one purpose of endeavoring to assist to extricate the case of the Omaha Electric Light and Power Company against the City of Omaha, from the dilema in which it is apparently placed.

What does the evidence offered by the appellant show as to what action caused the decline in the price of the bonds, and the extent of the decline?

Arthur Perry of Boston, senior member of the firm of Perry, Coffin and Burr, bankers, testifying on behalf of the appellant said that his firm with that of N. W. Harris and Company of New York, handled about $1,385,000 of the bonds of the company here in question. That his firm continued interested in the bonds and that he continued advised of developments affecting them. On page 188 of the record, this witness further testified that in 1910 he first learned of the decision of the Circuit Court of Appeals and upon learning of that decision, the bonds were taken off of the list of offerings and had since remained off the list. He further testified that some of the customers thereafter wanted to realize on the bonds and that his firm was forced to tell them of the developments, and to state that they could not pay what they had previously been paying for the bonds, but that they had taken some of the bonds from customers in the lower nineties and were carrying them and were offering none for sale. He was asked the following question and made the following answer:

"Q. So that the decision and controversy seriously affected the price at which they could be sold—lowered it?"

"A. It did."

On page 189 of the record, and on cross examination this witness testified that he could not say exactly whether or not it was the decision of the Circuit Court for the District of Nebraska, or that of the Circuit Court of Appeals which had the effect on the bonds stated by the witness. He testified, however, in that connection, that the memoranda of the firm showed that the decided drop in the price of the bonds was about May or June, 1910, the early part of that year.

This constitutes all the evidence in the record as to the effect upon the securities held by the trustee or the bonds in any way connected with the litigation or controversy concerning the resolution in question. It shows conclusively that it was not the enforcement or threatened enforcement of the resolution which lowered the price of the bonds, but that it was the feared or fancied effect on the bonds of the reasons given by the Circut Court of Appeals in affirming the decision of the lower court.

It will be borne in mind that the price of the bonds did not fall until May or June of 1910. The decision of the Circut Court of Appeals was handed down on April 20th of that year, (p. 268, record). The memorandum opinion of the Circuit Court for the District of Nebraska was handed down on the 23rd of December, 1908, and the resolution had been passed many months prior to that time. So that it is conclusively established that the enactment of the resolution and its threatened enforcement had no effect upon the price of the bonds and in no wise impaired any of the securities held by the trustee. It is to be remarked further, in this connection, that the manager of the company was on the stand and testified, but that he was not questioned and he did not testify to any impairment or any injury to the property or revenues of the company.

What does appellant's further showing indicate and justify? It introduced into the record a letter or communication of its president, issued for the purpose of assisting in the sale of the bonds and bearing date of July 10, 1905. This letter appears on pages 195-198 both inclusive, of the record. It is stated therein that the company controls the entire electric light and power business of Omaha and South Omaha, and, with minor exceptions, the gas business in Council Bluffs. That the population served in these cities is estimated to be 170.-000. The population of Council Bluffs is given at 28,000, that of South Omaha at 30,000. In its bill of complaint and in the record herein it is shown that in addition to the cities above named the Electric Company serves many outside towns and villages and adjacent territory, conservatively estimated at 15,000 population or more.

The president's letter above mentioned sets forth the following:

CAPITALIZATION.

Capital Stock	
Preferred Issued	$ 481,800.00
Common Issued	2,007,500.00
Total	$2,489,300.00
First mortgage bonds issued and outstanding	$1,580,000.00

EARNINGS YEAR ENDING MAY 31, 1905.

Gross Receipts	$379,187.36
Operating Expenses and Taxes	254,519.62
Net Earnings	$124,667.74
Bond Interest	73,979.19
Surplus	$ 50,688.55

The above surplus was sufficient to pay a little more than 2 per cent upon the issued stock. It is further stated

in said letter that the company makes an arbitrary charge of $40,000 per annum against depreciation, and carries this charge directly in the item of "Operating Expenses and Taxes." It is further said, "but for this charge it would show net earnings of more than double the interest on the outstanding first mortgage bonds."

An analysis of the foregoing table discloses that the item "Operating Expenses and Taxes" amounts to approximately 67 per cent of the item of "Gross Receipts."

On page 13 of the record, and in the bill of complaint, the gross earnings of the company for all purposes from and including the year 1890 to and including the first six months of 1911 are set out. The population of South Omaha, and other outlying territory served by the company is at least one-third of that of the City of Omaha. The present outstanding bond issue by the company amounts to $2,388,000. Consequently, an adjusted statement for the year 1910 would appear as follows:

Gross receipts from light	$718,763.77
Gross receipts from power	195,800.65
Gross miscellaneous receipts	5,802.92
Total	$920,367.34
Deduct two-thirds of total power earnings, $195,800.65, to adjust the figures to the population served outside of Omaha	$120,533.76
Balance of total earnings	789,833.57
Deduct estimated operating expenses, 67%	521,290.14
Net earnings	260,645.07
Deduct interest on bonds	119,400.00
Net surplus remaining	$141,245.07

This surplus is sufficient to earn slightly less than 6% on the above capitalization.

Similar computation on the figures for 1911 gives a net surplus available for dividends on the entire capitalization in excess of 6.6%.

There are no reason, apparently, why the above estimates of operating expenses and taxes to gross earnings is not fair and liberal to the company. The population served outside of Omaha is more than one-third of the population of Omaha and an allowance of two-thirds to the company in an adjustment is more than liberal. It will be remembered that the resolution does not question the right of the company to continue its service outside the City of Omaha.

Since the date of the above letter, July 10, 1905, the company has sold additional bonds amounting to $808,000. These sales were made, according to the company's own showing at a time when it was earning less than it has earned for the years 1910 and 1911, or any year since that time.

The letter referred to states that additional bonds sold must be for 80% of the costs of permanent improvements and then only when the net earnings of the company are one and one-half times the interest charges on all bonds outstanding. A reference to the net earnings for the years 1910 and 1911 will show that they were in excess of double the interest charge upon the total authorized issue of all bonds.

In the light of these established conditions, and in light of the only testimony in the record with reference to any depreciation in the securities held by the appellant, the claim that the value of the securities have depreciated or is threatened with depreciation as the result of the enactment of said concurrent resolution, seems so far unsupported by any of the testimony, as to make it nearly humorous. The most that can possibly be said of the effect of the enforcement of said resolution would

be to deny to the light company or the holders of its securities not to exceed two-thirds of its gross earnings from power sources—a sum wholly inadequate to cause any depreciation in the value of the securities and this especially so when sufficient earnings remain to enable the company to pay a dividend upon all of its issued stock in excess of 6%.

Third: Assuming that appellant has shown itself entitled to some relief, what should be the measure of that relief? Clearly it is not entitled to all the relief it seeks in its bill. The measure of appellant's interest in the controversy is the protection to which it might be entitled. After the bond obligations have been satisfied, it has no further interest in the controversy. It will not be heard to fight out, or attempt to fight out the battles of the company.

However this may be, for the time being, a time will come when the securities will be paid or should be paid and when that time does come, the mask behind which it is doing battle for the company will be removed. Consequently, in this action and assuming that appellant has shown itself entitled to have the security held in the same condition that it was at the time the bonds were issued, the appellant is entitled only to such relief as would protect the security. It is not necessary for this court to decide that the grant in Ordinance 826 was a perpetual one. This is entirely unnecessary to give to the appellant the full measure of its relief, whatever that may be, if any. It is likewise unnecessary to decide that the grant in 826 gave or did not give to the company authority to distribute current for power purposes, because the security is fully protected and abundantly ample from the revenues derived from lighting sources, in the City of Omaha alone. This source of return is not questioned by the resolution. It is not necessary to de-

cide that the city has in anyway estopped itself from questioning the right of the company to distribute current for power purposes, for the reasons above stated.

Therefore, on the assumptions above made, a decree which might continue conditions in statute quo until the maturity of the bonds, in 1933 would fully measure the relief to which appellant might be, under the outside circumstances, entitled to. In the light of appellant's bill and in the light of its brief, it does appear that appellant is anxiously borrowing an immeasurable lot of trouble. It may be contended that, if it becomes necessary to sell the securities in order to realize on the holdings, the franchise would be comparatively of little or no value unless adjudged to be in perpetuity. Such a contingency, to begin with is so far remote as to be a speculative possibility only, inasmuch as unquestionably the company is and would continue to pay all interest charges on the bonds, and a big dividend besides. These possibilities could be readily taken care of when that time arrived, if ever it did arrive. To adjudge the ordinance a perpetual grant, simply to protect a speculative possibility would seemingly involve an injustice and pronounced wrong against the city, without a justifying necessity so to do and would enable this appellant to accomplish fully the apparently unquestionable purposes of this action. If the light company is entitled to have it determined that there was given it or its assignor a perpetual grant, then a decision to that effect should be in the light company's litigation with the city and not in this litigation. If the light company has not been given a perpetual grant, then it should not be decided in this suit that the light company has a perpetual grant. If the city has forever estopped itself from questioning either the extent of the grant or its duration or both, then it should be so decided in the litigation between the city and the com-

pany and not in this litigation, inasmuch as there exists no justifying necessity for such decision.

II.

CRITICISMS OF APPELLANT'S "STATEMENT OF THE CASE."

In paragraph 1 of the first page of appellant's brief it is said that this suit was begun to enjoin the City of Omaha and its officials from enforcing a resolution adopted by the City Council of that city, directing the City Electrician to cut the wires of the power company which carried electric current to be used for power purposes. With this part of the statement of the purpose of the suit we have no controversy.

Following this, however, there appears a more or less extended statement of the methods by means of which electric energy is made available to the consumer, and the lack of the producer's control over the consumer's use of the purposes to which he may employ the current. This subject may furnish theme for entertaining academic discussion, but we fail to see or appreciate its usefulness in connection with any issue to be determined in this case. Such discussion necessarily relates to current furnished for lighting purposes principally, but which might be incidentally employed by the consumer to minor power or heat uses. Whether or not it is within the power of the company to deny this incidental use to the customer or to regulate it is inconsequential in connection with any issue presented in this case.

The company did have and does have many customers to whom it furnishes current for power and heat purposes, especially power. It has installed apparatus and strung wires, and employs and uses the apparatus and

the wires for this specific and particular purpose. The resolution in question questions only this right. Questions this servitude and claims it as an additional servitude to that of furnishing current for light. The resolution can by no reasonable construction of the language be said to apply to current principally supplied for light, though possibly incidentally employed by the consumer for other purposes. As to that apparatus and those wires employed to furnish current for power, to power users and power consumers, there can be no question as to the right of the company to regulate or discontinue such service.

On December 18, 1884, the City of Omaha did grant to the New Omaha-Thomson-Houston Electric Light Company, or assigns, a right of way through, upon and over its streets, alleys and public grounds, for the erection and maintenance of poles and wires with necessary appurtenances, for the purpose of transacting a "general electric light business;" but this grant was not a perpetual one, nor so intended or understood.

The city feels that it will be able to challenge successfully the assertion in appellant's statement, that the Supreme Court of Nebraska has decided that a municipality in this state was vested with authority to make a perpetual grant. That it will be able successfully to challenge the assertion, in said statement, that the grantee or its assigns, ever since the grant, has held itself out as engaged in the business of generating and distributing to patrons electric current in the production of power and heat, and in this connection asserts that appellant's own showing in the record fails to disclose that said grantee was engaged in distributing current for other than lighting purposes prior to the year 1890, or some five or six years after the acceptance of the grant. That it will be able successfully to challenge the assertion in

said statement that the city and the company in carrying out the ordinance have uniformly placed upon it a practical construction to the effect that the phrase, "general electric light business," implies the function of generating and distributing electric energy to be utilized for light, heat, power and other available purposes. That if the grant contained language and terms sufficiently ambiguous and uncertain as to require or to call for a practical construction covering years in order to determine and ascertain its purpose and meaning, as granted, then under all the rules of construction recognized as justly applicable to the proper construction of legislative grants, demands that such persistent doubt and uncertainty defeats any grant which may be claimed under such ambiguous terms. That the city will be able successfully to challenge the correctness of the assertion that the City of Omaha, by any course of dealing with the company has encouraged it to make any expenditures or any construction of plant, which in equity or in good conscience should now estopp the city to question the right of the company to distribute current for power purposes.

There remains no dispute but that in 1903 the Omaha Electric Light and Power Company mortgaged to the appellant, as trustee, its property and franchise to secure a large issue of bonds, and that many of the bonds were issued and sold. That the bonds so issued may have been purchased and sold under advice from attorneys that the franchise was unlimited as to time; but be that as it may, such advice was not encouraged or ordered by any conduct of the city or any statement or representation from it.

The City of Omaha justifies the passage and enforcement of the resolution in question, not alone upon the grounds stated by counsel in the statement of the

brief, nor entirely upon the particular grounds therein stated. The passage and enforcement of the resolution was justified upon the grounds that the city had never granted or intended to grant to the grantee company, or its assigns authority to plant poles, string wires and maintain apparatus in the public streets and public places to distribute current for power, heat or like purposes. That the grant did not contain authority for any such servitude. That the grant was expressly limited and confined to the right to string wires and maintain apparatus for distributing current for lighting purposes only; that the grantee so understood the grant and prepared itself to perform only this particular kind of service.

It is true that the city may contend that every right given by the grant has since expired by lapse of time. That the rights were given only for the life of the grantee and ended with it. The city passed the resolution and undertook its enforcement because it believed that it had never given to the light company, or its assignor, the right to maintain apparatus and wires in the public places to distribute current for power and heat, and because it knew that such servitude or right was an additional one to that of the right to maintain fixtures and appliances to distribute current for light.

As we have before said, it was the decision of the Circuit Court of Appeals which caused such fluctuation that the evidence shows occurred, in the price of the bonds. It was the reasons given by the Circuit Court of Appeals for the affirmance of the decision of the lower court and not the fact of its affirmance, which caused such fluctuation. The mere affirmance of the decision of the lower court without a statement of the reasons therefor, that the rights in the grant had expired by limitation of time, would not have affected even the price

of the bonds. The record fails to show that the passage and enforcement of the resolution by the municipal body had produced such effect, and the record fails to show that the decision of the lower court had produced such effect. This action on the part of the municipal body and its affirmance by the lower court simply affected merely the right to distribute current for power purposes in the city, and the curtailment of the revenue dependent upon this service was not of sufficient importance to impair or even threaten the value of the securities or the value of the bonds. It was only when the Circuit Court of Appeals announced as a reason for affirming the lower court that all the rights under the grant had expired, which caused any depreciation in the price of the bonds. In other words, it was the apprehension which that decision might justify, that the city might take steps to discontinue all service by said light company, unless a new franchise was granted, which caused any decline in the bonds.

III.

ORDINANCE 826, ON ACCEPTANCE BY THE GRANTEE, DID NOT CONSTITUTE A PERPETUAL GRANT OF RIGHT OF WAY THROUGH, UPON AND OVER THE STREETS, ALLEYS AND PUBLIC GROUNDS OF THE CITY OF OMAHA, FOR THE ERECTION AND MAINTENANCE OF POLES AND WIRES WITH NEEDFUL APPURTENANCES, FOR THE PURPOSE OF TRANSACTING A "GENERAL ELECTRIC LIGHT BUSINESS," OR OF TRANSACTING ANY OTHER BUSINESS.

Counsel disclaims contending that the grant was a mere gratuity, and admits that upon its acceptance

obligations were imposed upon the company to render the service to the public, for which the grant was made to secure. This would seem to be the rule under all decisions since the Dartmouth College case. This is the rule by which we desire to test the intentions of the parties to this grant. We assume that counsel will admit that the acceptance of the grant imposed upon the grantee the obligation of performing fully the services desired to be secured and for the full period of time, whatever that may be, for which the grant was made.

We will admit that the State of Nebraska, through its courts has reasonably well exacted from public service corporations the full performance of obligations assumed under public grants; and that the cases cited reflect the attitude of the courts on these questions, not alone in Nebraska, but elsewhere in the various states from which decisions are cited.

Counsel has said in this phase of his brief, and with respect to the grant in question, that the right of regulation, in the exercise of the state's police power, and legislation in the exercise of its rate making powers, are still secured to the municipality, though appellant's contention should be upheld as to the perpetual feature of this grant, and on that point cites *New Orleans Gas Company vs. Louisiana Light Company*, 115 U. S. 650. This case, however, goes simply to the question of the right of the exercise of police powers, notwithstanding the existence of a grant, and does not go to the question of the right to fix rates or charges in the exercise of legislative powers in those respects. Just why counsel digressed to introduce this particular subject is not apparent, unless our view of the purpose of this suit be the correct one—that is to say, a suit primarily and fundimentally to fight out the battles of the grantee or its assign. If this grant is adjudged to be a perpetual one,

serious doubts indeed arise as to the right of the municipal authorities to fix and prescribe rates, to exact reasonable compensation to the public and the city for the value of the grant and the use and exploitation of the city's public property by the corporation, and to prescribe, fix and enforce such reasonable terms, exactions, observances and conduct on the part of the company in the use and occupancy of the streets as will conduce, advance and further the welfare and commerce of the community. But, be this as it may, it appears an irrelevant and immaterial digression having for its object and purpose a befogging of the pertinent issues.

Testing then, the life and intended life of the grant in question by the consideration suggested by counsel, innumerable reflections obtrude:

(1) The grant in terms is not forever or in perpetuity. Such words or similar words are not found in the grant. If "perpetuity," "without limit of time," or "forever," or like meaning, is to be inferred, the inference must arise from negative rather than from an affirmative condition. The inference must arise from the absence of terms fixing a limitation of time rather than from the presence of terms fixing perpetual duration of time. The law, under these circumstances does not ordinarily imply perpetuity in the grant. The rule of construction as to a municipal grant or the authority of a municipality to make a grant forbids such implication, unless, perchance it appears that such implication is indispensably necessary to the exercise of power or powers expressly granted.

The grant in question did not in terms require the grantee to accept it or to enter upon the services to be rendered under it. If accepted and entered upon, there are no terms in the grant requiring the grantee to continue the services entered upon, and the law would not

require performance beyond the life of the grantee. There are no terms requiring any particular kind or character of services, though generally the nature of the grant might fix the character of service, but the extent and manner of service is left entirely to the discretion of the grantee. The grant did not require of the grantee, at the expiration of the life of the grantee to assign the grant to any person or concern who would be under any obligations to assume it and continue it. It did not require the grantee to make any provisions whatsoever for the continuation of the service, beyond its own life period, in any event; but, beyond that time, at all events, there seems to exist absolutely and positively no obligations from the terms of the grant and no obligations from any known rule or law whereby the grantee would be under the slightest obligation or slightest necessity to perform or provide for the performance of the service which might be said to arise by virtue of the acceptance of the grant. Where then is the test of the reciprocity of obligations as a consideration for the grant, if the contention of the appellant be true and the grant was intended as one in perpetuity? The test of this rule of reciprocal obligations is not what has in fact happened under this particular grant, but rather what could have happened or could have been done under the grant; what either party might do, and do rightfully. If the duties assumed in the acceptance of the grant had proved burdensome rather than beneficial, and it had become distinctly to the advantage of the grantee to cease the performance of the obligations, at the expiration of its life tenure, could it not have done so, and would the city not have been remediless? These considerations seem the proper test. Therefore, the grant was binding upon the grantee for only the period of its life, on acceptance thereof.

It is to be remembered that the grant ran or rather was made to the New Omaha-Thomson-Houston Electric Light Company. It is said that that concern was not incorporated at the time and that it was not known when, or under what laws it would incorporate. The fact remains, nevertheless, that the grant was to such concern by the name under which it incorporated and that it accepted the grant. The mayor and council must have known that someone proposed or intended to assume such name and to provide in some lawful way to enter upon the provisions of the services said to be required under the grant. It won't do to say that by sheer accident this particular name was hit upon. Somebody was requesting the grant in that name. The grant was made to someone in that name. A corporation was incorporated under the laws of this state under such name, and after incorporation the grant in question was accepted by the concern so incorporated. It is idle to say that this company was hit without being aimed at.

This grantee concern and those promoting its interests, of all others, are most competent on the question of the time for which such grant was made. The concern incorporated nearly a year after such grant was made, after abundant time had intervened to inspect, study and determine its provisions and its purposes. There is no evidence quite so dependable and assuring as the acts of these parties with respect to their rights and interests as they understood them at the time. They had asked for the grant, they had asked for it in terms, measured to their desires and it had been granted to them, and they understood exactly the full meaning of the grant. If good faith is to be imputed to the motives and acts of the grantee, and certainly no other presumption ought to prevail, then the fact that this company, long after the grant was made to it incorporated for the period of

twenty years, without making any provisions whatever for continuing or attempting to continue the services exacted of it under the grant or making any provision whatever for continued existence on its own part, ought to be conclusive of the question of what period of time it was commonly understood that the grant imposed the obligation upon it. It knew that if the grant were perpetual, then it would be required to perform the duties perpetually. Assuming that the grant was a perpetual one and so intended and so understood, then the grantee's failure to make proper provisions for the full performance of the services to be secured to the public, either by assuming that duty itself or making proper provisions for others to assume it, then the company is properly chargeable with an attempt to play fast and loose with the public, to experiment with a grant for a short period of time, by incorporating for that period without obligating itself to proceed with the grant at the expiration thereof, and if the experiment proved beneficial rather than burdensome, then to continue the performance of the service; but if, on the contrary, if the experiment turned out to be burdensome rather than beneficial then to avail itself of the right to discontinue the service and abandon the grant. This assumption seems unlikely, and the real explanation must be found in the fact and circumstances that it was understood between the city and those asking for the grant that the grant was for a period of twenty years, and adapting itself to such understanding it incorporated for that period of time.

And in *Omaha Electric Light and Power Company vs City of Omaha,* 179 Fed. 455, on this point the Circuit Court of Appeals well said:

> "It is improbable that the mayor and city council, with due regard for the rights of the inhabitants of the city, would tie their own hands as well as

that of future councils and mayors, by granting a perpetual franchise to a company whose corporate life rendered it certain that it could not discharge its duties more than twenty years, and with no obligation upon it at the end of its life to assign its rights to another person or corporation empowered or obligated to accept the grant and perform the desired services."

No necessity existed for a perpetual grant.

The grant in terms was not in perpetuity. Nothing passes by intendment in a municipal grant, but must be expressly given. Any substantial doubt as to whether or not a perpetual grant was made by said ordinance must result, under well recognized rules of construction in a denial of the perpetual character of the grant. A perpetual grant was not necessary in order to secure the full exercise of the expressly granted powers given the municipal council or given in said grant. This is evidenced by the willingness of the grantee to enter upon the performance of the services granted for a period of twenty years.

As was aptly said by Judge Day in *Blair vs. Chicago*, 201 U. S. Sup. Rep., p. 400-463:

"That one who asserts private rights in public property under a grant of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied."

The Federal Court of Appeals in the case complained of very pertinently remarked:

"A perpetual franchise, even if not exclusive in fact, becomes largely so by the advantage in the race which preoccupancy of the field and perpetual right to continue in it afford."

In *Logansport Railroad vs. City of Logansport,* 114 Fed, 688, is to be found the following apposite and remarkable summary:

> "Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different, and have different consequences from those fixed in monopoly. Consequently, those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

The Federal Court of Appeals in passing upon this same question, *supra,* aptly remarked with reference to the grant in question:

> "The ordinance when taken as a whole and construed in the light of what was expressed, as well as unexpressed in it, and in view of all the attending facts and circumstances, discloses, we think, a clear purpose not to grant a perpetual franchise. The right to use the streets of a city forever to inaugurate and promote a private enterprise would seem to have been so important and valuable a feature to a contract as to irresistably lead the contracting parties to mention it specifically, if they intended to provide for it and not leave its existence to depend upon implication."

In *Blair vs. Chicago, supra,* the following further observations were made:

> "While it is incumbent upon those claiming under a public grant, as we have already stated, to make out the rights contended for by the terms which clearly and unequivocally convey them, and it is enough to deny the privileges contended for, if,

upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred." * * *

"Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give." * * *

"'Words of equivocal import,' said Mr. Chief Justice Black, in *Pennsylvania Railroad vs Canal Commissioners,* 21 Pa. State, p. 9-22 'are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature.' 'The just presumption,' says Cooley in his work on Constitutional Limitations, 7th Ed. p. 565, 'in every such case is that the state has granted in express terms all that it designed to grant at all;' and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: 'This is sound doctrine and should be dilligently observed and enforced.'"

In *Rock Island vs. Central Union Telephone Company,* 132 Ill. App. 38, it is said:

"The ordinance of 1887 did not limit the period during which appellee could maintain its poles and wires upon the street. That did not make the ordinance a grant in perpetuity. * * * A grant to a corporation aggregate, unlimited as to the duration of its existence, without words of perpetuity being annexed to the grant, only creates an estate for the life of the corporation."

Again in *Blair vs. Chicago*, Supra, at p. 463, et seq, is to be found:

> "In the west side system the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to convey the right in perpetuity to the occupancy of the streets. * * * We think in such case that the terms granted would not extend beyond the life of the corporation conferring them where there was no attempt to confer a definite term, assuming, without deciding that it was within the authority of the municipality to make a grant in perpetuity."

To the same effect see:

People ex rel vs. Central Union Telephone Co., 232 Ill. 260, 279.

People vs. Chicago Telephone Co., 220 Ill. 238.

Snell vs. Chicago City Railway Co., 236 Ill. 349.

Telephone Co. vs. Telephone Co., 118 Ky. 277.

Louisville Trust Co. vs. Commonwealth, 76 Fed. 296.

The rule of strict construction of the language of a municipal grant to a user of its public streets and places in the exploitation of private enterprises, here insisted upon, is so intimately connected with the rule of strict construction of grant of powers from the legislature to municipal bodies, that for the time being, we shall pass it with the additional observation, that any uncertainty or ambiguity of a substantial nature as to whether or not the grant in question is or is not a perpetual one, must defeat the claim of perpetuity. The appellant is burdened with the duty of pointing out to the court language in the grant which unquestionably and explicitly makes the grant a perpetual one. Failing in this it fails in its contention in that respect.

At the Time of the Grant in Question, the Municipal Authorities were Powerless to make a Perpetual Grant, Though Such be Held to be Their Purpose.

1. Because prohibited by the constitution of this state.

The legislation by the municipal body, here in question, was with reference to matters concerning which a delegation had been made to it by the state legislature, and its action, within the scope of the delegated authority was, in legal effect, a state law; and fall within the inhibitions of the constitution of this state, if contrary thereto.

Section 16, Article 1, of the Constitution of Nebraska, then, as now, read:

> "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts or making any irrevocable grant of special privileges or immunities shall be passed."

All grants of franchises are special privileges, and a perpetual grant is a special privilege and an immunity as well. The constitutional provision above quoted does not prevent the granting of a special privilege or immunity, but prevents the granting of an "irrevocable special privilege or immunity." This constitutional provision was intended to accomplish some useful purpose, to prevent some recognized abuses. It is conceded that under this provision of the constitution an irrevocable exclusive grant could not be lawfully made, though that grant be of limited duration. A perpetual grant is to the extent of that grant an exclusive one. None other can use or enjoy that particular grant. The municipality itself is powerless to restore to itself that particular grant, or the rights given by it. If the grantee were to

occupy all the available space in the public streets and alleys in the exercise of the functions of the grant, then for all practical purposes there would exist an irrevocable, perpetual and exclusive grant. It is difficult indeed to understand why this language of the constitution should be held to apply to an irrevocable exclusive grant, though of short duration, and not to apply to an irrevocable perpetual grant, which for all practical purposes, as we have seen, might be as exclusive as the one granted as such.

We are aware that it will be contended that the Supreme Court of this state has held that the provisions of the constitution above cited applies only to an exclusive irrevocable grant as such. But, we think that the case should not be authority here for the simple and all sufficient reason that the grant in question there was not a perpetual grant, was not so held and was not so regarded. We consider it an open question in this state, notwithstanding the decision referred to. The contention that the constitutional provisions applies to exclusive grants and not to perpetual ones, seeks a restriction upon the language used in the constitutional provision at variance with both its spirit and its language. If by the provisions of the constitution above, it was intended simply to inhibit the enactments of irrevocable grants in terms exclusive, then it seems manifest that the language of the constitutional provision would have addressed itself to this particular form of abuse. The ease with which it could have been done and the fact that it wasn't so restricted argues convincingly that it wasn't so intended; that it was intended to prohibit recognized abuses and under whatever guise they might be presented. Experience seems to have demonstrated that irrevocable exclusive grants and irrevocable perpetual grants have long been and continue to be co-evil com-

panions of legislation, alike to be prevented.

In *Bank of August vs. Earle,* 14 Peters 227, it is said:

> "Franchises are special privileges conferred upon individuals, and which do not apply to the citizens of the country generally, of common right."

Birmingham vs. Railway, 99 Ala. 464.

Port of Mobile vs. R. R. Co. 84 Ala. 464.

McQuillan Mun. Ord. Sec. 200.

San Antonio Traction Company vs. Geo. A. Allgeldt, 26 Sup. Ct. p. 261.

2. The municipal council was not authorized by the legislature of the state to make a perpetual grant.

At that time the charter provisions were: Sec. 15, Chap. 10, Laws of Nebr., 1883, p. 89, read:

> "The mayor and council at each city created or governed by this act, shall have power to pass any and all ordinances not repugnant to the constitution and laws of the state, and such ordinances to alter, modify or repeal."

Subdivision 8, at p. 90, read:

> "To provide for lighting the streets, laying of gas pipes, and erection of lamp posts, and to regulate the sale and use of electric lights, the charges for electric lights and the rent of gas meters within the city."

Subd. 24, Sec. 15:

> "(Streets) To care for and control, to name and rename streets, avenues, parks and squares within the city; to provide for the opening, vacating, widening and narrowing of streets, avenues and alleys within the city under such restrictions and regulations as may be provided by law."

These provisions of the statute measured the full extent of authority expressly vested in the municipal council respecting such matters. As said by the Circuit Court of Appeals, the grant of a perpetual franchise is a servitude not embraced within the general control usually given municipal bodies over the streets.

The granting of a franchise is an act of sovereignty. All such power is vested in the sovereign and may be exercised by it either directly or by delegating such power to an inferior or municipal body. If the authority has been expressly given by the legislature to the municipal board to grant franchises or a particular franchise for all time, then it may be such board would be authorized to make the grant. Or if the legislature has delegated to the municipal body the authority to exercise specific powers and it turned out that in order to the full exercise of such powers a perpetual franchise becomes necessary, in that event probably the legislature has impliedly conferred upon the municipal board the right to make the necessary grant. Where, however, the authority has not been expressly given to the municipal body to grant a perpetual franchise, and where a perpetual franchise is not necessary to the full exercise of expressly granted powers, then no authority or power is vested in the municipal body to make a perpetual grant.

The cases are legion and probably unanimous on this point. Anyhow, we have not been able to find a disenting one. This must be so because municipal boards and bodies are boards and bodies created to exercise only delegated authority, therefore, such bodies must act within the terms of the delegated powers. Whatever the sovereign nas not delegated it has withheld.

Concerning the franchise in question, and as we have heretofore remarked, there existed in the statute no ex-

pressly conferred authority to make a perpetual grant, and there was no necessity apparent or suggested for such a grant in order to secure to the municipality the full and complete exercise of the powers delegated by the legislature. All powers could have been completely exercised, their purposes and ends as fully accomplished by a limited life tenure grant of the character in question. There is nothing to indicate that the grantee desired or expected a perpetual franchise, and the evidence conclusively shows that it made no preparation to perform the services which might be required under a perpetual grant.

We are impressed that Judge Adams in the opinion of the Circuit Court of Appeals, supra, so tersely and comprehensively and explicitly met these questions, as to admit of no improvement. On page 268 et seq of the record herein, we have what he said:

> "Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power except so far as expressly delegated or is indispensably necessary to the exercise of some other power which has been expressly delegated."
>
> "Applying this rule to the present case we are of the opinion that conference of power in general terms to 'provide for lighting of streets' or 'to care for and control the streets,' is not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business. That is a servitude not embraced in the ordinary control over streets usually given municipalities."
>
> "A perpetual franchise, even if not exclusive in fact, becomes largely so by the advantage in the race which preoccupancy of the field and perpetual right to continue it affords. And while it may not be technically obnoxious to the

constitutional prohibition against 'granting special privileges or immunities,' it is so unusual and extraordinary as to require, in our opinion, a more specific legislative authorization than the general language relied on by the company therefor."

"We, therefore, conclude that even if the mayor and council had intended to grant a perpetual franchise to the company, they were powerless to do so."

In *City of Ottawa vs. Carey,* 108 U. S. 110, Sup. Ct. Rep, 361-364, it is said:

"Municipal corporations are created to aid the state government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established."

In *Rhinehart vs. Redfield,* 93 App. Div. (N. P.) 410, it is said:

"It is fundamental that a municipal corporation holds its public streets and places in trust for the public, and that the power to regulate those uses is vested in the legislature absolutely. It may delegate that power, as any other appropriate power, to the municipal corporation, but without such delegation any such act by the corporation, because of its not being within the strict or implied terms of its chartered powers, would be invalid. * * * Words and phrases which are ambiguous, or admit of different meanings, are to receive in such cases, that construction which is most favorable to the public."

"The power to regulate all matters connected with the public wharves and all business conducted

> thereon, and with all parks, places and streets of the city is not a power to grant a special privilege to individuals, involving not alone the right to put in pipes, conduits, etc., but the right to perpetually maintain them, and to have an exclusive interest in the streets for the purpose of carrying on a private business; is not a delegation of power to grant to individuals a right of property in the highways held in trust for the public."

In *Jackson County Horse R. Co. vs. Interstate Rapid Transit Ry Co.* (C. C. A.) 24 Fed. Rep. 307, it is said:

> "The precise question is, had the city of Kansas the power to grant for a term of years the exclusive right to occupy its streets with street railroads? That question must be answered in the negative. Let me in the outset formulate two or three unquestioned propositions: (1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant special privileges; (2) It may, with same limitations, grant a like power to municipal corporations as to all matters of a purely municipal nature; but (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organizations and popular government, he who claims such exclusive privilege must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges, etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or as often epigrammatically said, 'a doubt destroys a grant.'"

In *Barnett vs. The City of Dennison*, 145 U. S. 135, 12 Sup. Ct. Rep., it is said at p. 820:

"It is the settled doctrine of this court that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given or implied, because essential to carry into effect such as are expressly granted."

In *Logansport Railroad vs. City of Logansport,* 114 Fed. 688-689 it is, in part, said:

"Before the complainant, can in a court of equity, complain of the violation of the city of its contract rights, it must show that it has a contract, and that such contract is * * * * within the power of the city lawfully to enter into. * *

"It is manifest from a reading of the above mentioned statutory provisions that the legislature has not conferred, in explicit and express words, on the city of Logansport, the power to grant to a street railway company either an exclusive or a perpetual use of its streets for railway purposes. * * * * * * No words of perpetuity are expressly employed. * * * There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed?"

After reviewing another case, the court then says:

"And so it must be held here that similar and no broader language employed in the acts of 1861 and 1891, above mentioned, does not explicitly and directly confer the power on the common council of the City of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes." * * *

"And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise." * * *

"Easements in the public streets for a limited time

are different, and have different consequences, from those given in perpetuity and in monopoly. Consequently, those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them." • • •

"It was ultra vires the common council to surrender its control of the streets of the city in perpetuity to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect." • • •

"Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of public, and not for the private advantage and gain of railway or other corporations."

In *Boise City Artesian Hot and Cold Water Co. vs. Boise City,* reported in 123 Fed. at p. 232, it is said:

"There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with water for a stated period of time, accepted and acted upon by the grantee thereof, is a grant of a franchise given in consideration of the performance of a public service and is protected against hostile legislation." • • •

"But had the Eastmans such a contract with the city as to come within the rule just cited? The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privi-

lege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at the will of the grantor, or, by its acceptance on the part of the grantee it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. In the constitutions of nearly all the states it is provided that no exclusive or perpetual franchise shall be granted, and, irrespective of such constitutional limitation it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets. The City of Boise was incorporated by the territorial Legislature of Idaho on January 11, 1866. It was given power 'to provide the city with good and wholesome water,' and to erect or construct 'such waterworks and reservoirs within the established limits of the city as may be necessary or convenient therefor.' There can be no doubt that under this provision of its charter the city had the power to grant the use of its streets for a fixed reasonable period of time, either to an individual or to a corporation, for the purpose of furnishing water supply to the inhabitants. It had no authority, however, to make a perpetual contract. A municipal corporation intrusted with the power of control over its public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the legislature. Cooley's Constitutional Limitations (2nd Ed.) 205-210; Dillon on Municipal Corporations pp. 715-716; *Barnett vs. Dennison* 145, U. S., 135-139, 12 Sup. Ct. 819, 36 L. Ed. 652. And legislative grants of power to municipal corporations are to be so strictly construed as to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof."

Citing many cases.

In *Water, Light and Gas Company vs. City of Hutchinson,* 207 U. S. 385; 28 Sup. Ct. R. 135, it is said:

> "The kind of privilege is defined, not the extent of it. It is exclusive of some persons, but not of all. It is exclusive of those who have not a grant from proper authority. There are privileges which may exist in their full entirety in more than one person, and the privilege or franchise or right to supply the inhabitants of a city with light or water is of this kind. A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impune the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit—explicit in the letter of the grant—or, if inferred from other powers or purposes, to be not only convenient to them, but indispensable to them. And these conditions are imperative—too firm of authority to be disregarded upon the petition of equities, however strong."

In *People's Passenger R. Co. vs. Memphis City R. Co.,* 10 Wall. 38, it is said:

> "Such corporations are usually invested with the power to lay out, open, alter, repair and amend streets within the corporate limits; but the rule is well settled that by virtue of those powers, without more, they cannot grant to an association of persons the right to construct, and maintain for a term of years, a railway in one of the streets of the municipality, for the transportation of passengers for private gain, and that a resolution or ordinance of the authorities granting such a right is void."
>
> "Special powers are given to such corporations to lay out, open and repair streets, as a trust to be held and exercised for the benefit of the public, from time to time as occasion may require; and the general rule is that those powers cannot be

delegated to others, nor be effectually abridged, by any act of the municipal corporation without express authority of the legislature."

In *Rhinehart vs. Redfield*, 93 App. Div. (N. Y.) 410, among other things, it is said:

"It is fundamental that a municipal corporation holds its public streets and places in trust for the public, and the power to regulate those uses is vested in the legislature absolutely. It may delegate that power, as any other appropriate power to the municipal corporation, but without such delegation any such act by the corporation, because of its not being within the strict or implied terms of its chartered powers would be invalid. * * * The relators recognize the necessity of showing legislative authority for the action of the common council, and our attention is called to subdivision 3 of section 12 of title 2, chapter 583 of the Laws of 1888. * * * Said subdivision of the section provides: 'That the common council shall have power within the said city to make, establish, publish and modify, amend or repeal ordinances, rules, regulations and by-laws, not inconsistent with this act, or with the constitution or laws of the United States, or of this state, for the following purposes.' * * * 3. To regulate all matters connected with public wharves and all business conducted thereon, and with all parks, places and streets of the city. * * * Is this a delegation of a power to grant franchises to private individuals? If the law maker was present, and he was asked if he had intended to comprehend this case when the statute was enacted, would he, as an honest and intelligent man, answer in the affirmative? * * * Would he declare that it was his intention, by this general language, to delegate to the municipal corporation the power to grant perpetual franchises, not for the general convenience and safety of the people, but as a foundation for a private business? * * * They attempt to invest these relators with a legal

> right to make use of the public streets for private gain to the same extent and with like effect as if possessing the franchise or privilege which the Sovereign power alone could grant. * * * And empower them to make use of this property held in trust for the public." * * *
>
> "Whatever may have been the powers of the common council to grant a license for the purpose of laying pipes in the streets, and upon this we pass no opinion, we are convinced that it never had any power to grant a franchise investing the relators with an interest in the streets, and the legal right to use them as a foundation in private business. * * * The power to 'regulate all matters connected with the public wharves and all business conducted thereon, and with all parks, places and streets of the city' is not a power to grant a special privilege to individuals, involving not alone the right to put in pipes, conduits, etc., but the right perpetually to maintain them."

The same rule of strict construction of grants by a municipality, or grants to the municipality, by the legislature is to be found in a long line of uniform cases with reference to the right to fix rates and charges for public utility service, such as water, gas, telephone and electric light. In cases of doubt, it is uniformly held that nothing passes by intendment or implication; and that where a doubt exists as to the right to fix rates and charges unalterably, for a definite period of time, or all time, such doubt is to be resolved in favor of the public.

In *Freeport Water Company vs. City of Freeport*, 21 Sup. Ct. (U. S.) 493, it is said:

> "The power of a municipal corporation to grant exclusive franchises must be conferred in explicit terms. If inferred from other powers it is not enough that the power is convenient to other powers, it must be indispensable to them."

So in the cases of *Danville Water Company vs. Danville,* 21 Sup. Ct. (U. S.) 505, *Rogers Park Water Company vs. Fergus,* 21 Sup. Ct. (U. S.) 490, the same rule was laid down, and in the last case, it is said:

> "A contract concerning governmental functions, such as one which affects the right of a city to regulate rates of a water company must be strictly construed, and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions."

To the same general effect is, *Knoxville Water Company vs. Mayor and Alderman of the City of Knoxville,* 23 Sup. Ct. (U. S.) 531.

In *Home Telephone and Telegraph Company vs. City of Los Angeles,* 29 Sup. Ct. (U. S.) 50, it is said:

> "Municipal authority to enter into a contract fixing unalterably, during the term of the franchise, charges for telephone service, and disabling it from exercising the charter power of regulation, must at the very least necessarily be implied from controlling statutes, even if it be conceded that anything less than a clear and affirmative legislative expression is a sufficient foundation upon which to rest an authority of this nature."
>
> "Charter authority to regulate telephone service and to fix and determine the charges therefor does not empower a municipality to enter into a contract, fixing unalterably, during the term of the franchise, the charges for such service and disabling itself from exercising powers of regulation."

In *State ex rel Marshall vs. Wyandotte County Gas Co.,* 127 Pa. Rep. 639, it is said:

> "The power to contract for rates for furnishing water, light, heat or power to a city or its inhabitants is a sovereign, governmental power,

which is vested in the law making power of the state. The power may be delegated to the mayor and council of a city, but is not to be inferred from mere convenience, but must be specifically granted or be absolutely essential to the exercise of the other powers expressly conferred on such mayor and council."

See also, *City of Woodland vs. Leech*, 127 Pac. 127. Decided Nov. 27, 1912.

The Supreme Court of Nebraska, has never decided, either in one or more decisions that, by ordinance when accepted, the grantee becomes vested with a perpetual right of way in the streets for the purposes named in the grant; or that the cities in this state, having charter powers similar to those possessed by Omaha, at the time of the passage of the ordinance in question, are vested with authority to grant such rights in perpetuity.

It so happens that the legislature of this state has never, in express terms or by necessary intendment, granted to municipal corporations the authority to make grants of perpetual franchises. It has everlastingly been the policy not to give such authority. Therefore, the Supreme Court of this state has never had occasion, so far as we know, to pass upon the question, whether or not municipal authorities, with express authority from the legislature so to do, could give a grant of rights in its streets, in perpetuity.

It is unfortunately true that in the early grants of franchises little care seems to have been taken in imposing restrictions and limitations. This was doubtless largely due to the fact of inexperience with the claims which corporations having received the grant might make to hang on to them forever, if they turned out beneficial.

Grants of later date, now made by the municipalities of this state, are found to be carefully prepared and the powers thereby conferred are hedged about by careful conditions and limitations. This, too, is but a natural development that follows the experience from the claim of corporations which have obtained fruitful grants. The public policy, therefore, of this state is never to grant or to permit the grant of a perpetual franchise. We make bold to assert that there isn't a single instance in the State of Nebraska where a perpetual grant of rights in the public streets has ever been given by a municipal body or legislative body of this state.

It is the fixed and unvarifying, though unwritten rule, of the Supreme Court of this state, that the decision of the court is always to be found in the syllabus or syllabi, as the case may be, and that the members of the court are bound only by a decision on the points appearing therein. This rule, has ever since its announcement been well known and recognized by the profession; and was so known and recognized before the decision of the cases cited by counsel under this general head of his brief.

In *Holliday vs. Brown,* 34 Neb. 232, the rule referred to was announced by this court in the following positive and definite terms:

> "There is an unwritten rule in this court that the members thereof are bound only by the points stated in the syllabus in each case. Each judge in the body of an opinion necessarily must be permitted to state his reasons in his own way without binding the members of the court to assent to all such reasoning, although they may concur in the conclusions reached."

Counsel has cited the cases of *Nebraska Telephone Co. vs the City of Fremont,* 72 Nebr. 25; *City of Platts-*

mouth, Appellant, vs. Nebraska Telephone Co., Appellee, 80 Nebr. 460; and *Sharp vs. City of South Omaha,* 53 Nebr. 700. Two other cases, to wit, *State vs. Lincoln Street Railway Co.,* 80 Nebr. 333, and *State vs. Citizens' Street Railway Co.,* 80 Nebr. 357, are also cited, but inasmuch as these two latter cases do not contain, even in the opinion the vice contended for by counsel, we shall not remark on them further in this particular connection. Referring again to the three cases first cited in the last list, we assert that the syllabus or syllabi in none of these cases contain a single word or sentence concerning a perpetual grant. Such question was not presented in the case for decision in either of them and was not decided. Such a question was not necessary or even appropriate to a decision of the points presented in any of these cases. The most superficial reading of the statement of the issues therefor in any of these cases discloses instantly and conclusively that no such question was properly presented thereby. No lawyer reading the syllabus or syllabi, as the case may be, of any of these cases could for a second be mislead as to what was decided by either of them. No lawyer reading the issues of the case would remain in doubt for a moment, that the question of a perpetual grant was not involved in the issues of any of these cases. These statements are made with the utmost respect for opposing counsel, but to meet the contention that appellant was advised at the time of the purchase of the bonds that the franchise was perpetual, and so held under the decisions of our court.

It seems to be lamentably true that the judge writing the opinion, did in a careless way, or by way of careless illustration speak of the franchise as a perpetual grant, or of the authority of the municipal authorities being sufficient to make such grant, or that there existed sufficient authority to authorize such grant. But as the Supreme

Court has said in *Holliday vs. Brown,* supra, each judge in the body of an opinion must be permitted to state his reasons in his own way without binding the members of the court to an assent to such reasoning. Every one of the three different decisions referred to, in the syllabus or the syllabi, as the case might be, that which contains the decision of the court, does not contain a decision upon the question for which it is cited by appellant, but contains decisions of the court on points and issues wholly unrelated and disconnected from any need or purpose to decide that the grants held by the various corporations were perpetual ones.

In the case of *Sharp vs. the City of South Omaha,* supra, the grant in the most express terms was limited to twenty-five years, and there isn't a pretense or possible claim with reference to its life period.

It is true that excerpts from the briefs of the different attorneys appearing in these cases show that some fuss was made with respect to the grant being, or not being a perpetual one, but, as we have shown the judge writing the opinion met these irrelevancies in argument by equal, but more distressing, irrelevancy in the opinion.

In *Nebraska Telephone Co. vs. City of Fremont,* supra, the following are the syllabi:

"1. When a city ordinance prescribed that permission to occupy the streets by a public service corporation shall be obtained with the consent of the mayor and council, such consent is sufficiently proved by an entry in the records of a meeting of the council presided over by the mayor. Reciting that a motion granting it was offered by a member and adopted, there being nothing to indicate that the mayor dissented."

"2. Forfeiture of franchises and easements of a public service corporation in the streets can be declared and enforced only by a court of com-

petent jurisdiction. The city claiming a forfeiture cannot be a judge in its own cause, or invade the privileges, or destroy the property of such corporation, in the absence of judicial warrant for so doing."

In *City of Plattsmouth vs. Nebraska Telephone Co.*, supra, the syllabi are:

"1. A city ordinance extending to a telephone company the right to use the streets, alleys and public grounds of the city in the construction, operation and maintenance of its plant or system, and which does not, in any of its provisions, indicate an attempt to exclude other or like corporations from a like privilege, is not the grant of an exclusive right or privilege."

"2. The authorities of a city or incorporated town or village may grant to a telephone company the use of the streets, alleys and public grounds of the municipality for constructing and maintaining a telephone system therein, such use of the streets, alleys and public grounds being for a public purpose."

"3. When an ordinance of a city has invited investments and expenditures, which are made in good faith and in reliance upon it, the city authorities, if the use be a public one, cannot arbitrarily impose by subsequent regulations, without necessity or demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power."

In *Sharp vs. the City of South Omaha*, supra, the following are the syllabi:

"1. It is within the power of cities of the first class having less than 25,000 inhabitants, to grant the right to a gas company to lay and maintain its pipes and mains under the streets and over the highways of the city for the purpose of supply-

ing its inhabitants with gas and to regulate the charge therefor."

"2. The authority to grant such a franchise is not restricted to persons or companies authorized to erect works within the city for the manufacture of gas, nor need such franchise be limited to the period of five years."

"3. Subdivision 15 of Section 68 of Chapter 13-a, Article 2, Compiled Statutes, is not a restriction upon subdivision 16, but a concurrent provision relating to another subject, the former to laying maines in the streets, the latter to lighting the streets."

As we have said, it is not only readily, but easily to be seen that there wasn't presented for decision or decided in any of these cases the question of the authority or power to grant a perpetual franchise or the question of whether or not a perpetual franchise was granted.

When the case of the *Omaha Electric Light and Power Company vs. the City of Omaha,* a case involving this same question, was argued before the Circuit Court of Appeals, the case of *Nebraska Telephone Company vs City of Fremont,* supra, esteemed the bell wether of this flock, was not only ably, but tearfully pressed upon the attention of that court, in the same connection that it is presented here. Considering what was claimed for the case and what in fact wasn't within the case, it is without wonder that an invocation not better accredited reached deaf ears, and did not receive the cold respect of a passing glance.

It is believed that the case of the *Omaha Electric Light and Power Company vs. the City of Omaha,* 179 Fed. 455, was the first case in which there was squarely decided the question of whether or not a legislative grant of power to a city, generally in the State of Nebraska "to provide for lighting streets and to care for and con-

trol the streets," was or was not specific enough to warrant a grant by the city to a business corporation of the right to use the streets of the city forever for the purpose of conducting a general lighting business. And in this case it was squarely held, under such powers that a perpetual grant was "a servitude not embraced within the ordinary control over streets usually given to municipalities."

Further direct comment upon what the cases cited did in fact decide would appear to be a useless waste of time and space. Were it not for the fact that the appellant complains that the bond holders whom it represents in fact in purchasing the securities in question relied upon these decisions as announcing the rule in this state to be that municipal corporations with like charter provisions as that of the City of Omaha, at the time authorized the governing authorities to make perpetual grants of franchised rights. Two pertinent observations suggest themselves in connection with this complaint:

First. It would seem that the bond holders at the time of taking the securities had some question and made some point concerning the life of the grant from the city to the company, in other words, they were put upon their notice and inquiry. This follows inevitably from the contentions of appellants' brief. This being true the doubt of the language of the grant which would arise from its mere inspection suggested itself to the bond holders, hence, they made the purchase, having in mind the risk naturally incident to such undertaking.

Second. If those whom they consulted were not better advised as to the law and decisions of the State of Nebraska, than would appear by such contention as is now made by them; then the City of Omaha should not be compelled to make good the possible losses resulting from such misguided course.

In this connection it is said in appellant's brief, page ——:

> "The bond holders, represented by complainant, purchased their bonds with the knowledge of and in reliance on the laws of Nebraska, and as announced by the Supreme Court, to the effect that the City of Omaha had, under its charter, authority to grant a right of way in perpetuity to the New Omaha-Thomson-Houston Electric Light Company over the streets, public grounds of Omaha, and that, by said ordinance, there was granted to said company such a right of way in perpetuity."

Isn't it manifest from these assertions that this particular question was raised and debated at the time of the purchase of the bonds in question? It is further claimed therein that the purchasers were also advised by the president of the company that in the opinion of the Nebraska counsel of the company that the franchise was unlimited in time and satisfactory from a business standpoint. Again, isn't it apparent that this particular question was up for consideration at the time of the sale of the securities? It is further said that the bond houses required an opinion from their own counsel, Messrs. Rope, Gray & Gorham, and from this firm received the assurance that the grant was a perpetual one.

The field of investigation and the sources of information were open to them. They were bound at their peril to be correctly advised and if not correctly advised it is no concern of the city.

The testimony of Mr. Perry (p. 124 et seq, record), shows that whatever advice was received with reference to the perpetual kind and character of this grant was received from sources wholly outside of the city and that whatever statements that may have been made in the cir-

culars and advertising matters for the sale of these bonds was prepared by parties having no connection or concern with the city. That the city or its officials had nothing to do with furnishing material, or the preparation of such circulars.

Consequently, in that part of appellant's brief wherein it is said:

> "The law of the State of Nebraska, as declared by its Supreme Court, construing the powers of cities under the statutes of that state and construing the effect of ordinances passed by such cities pursuant to such charter authority, entered into, and became part of the contract evidenced by the ordinance in question and its acceptance;"

including the citations of authorities under this point, is outside of any question to be presented in this case; for, as we have seen, the Supreme Court of this state has never decided that a municipality with charter provisions like those of the City of Omaha at the time of the grant had the authority to make a perpetual grant, and, of course, could not and did not enter into or become a part of the contract alleged by appellant. We deem it unnecessary to pursue in detail the various questions suggested under this particular head.

IV.

THE LIFE OF THE PARTICULAR GRANT IN QUESTION WAS LIMITED BY THE LIFE OF THE CORPORATION GRANTEE.

It is immaterial and of no consequence that the particular corporation was not in existence at the time of the grant. As we have seen, the grant was made to it in its name. Made to it in that name because it had been

requested and by those with authority to ask it. It is material and of much significance that the named grantee incorporated thereafter and accepted the grant. It incorporated for a period of only twenty years. It must be presumed to have incorporated to do the things fully which had been given to it under the grant. It had had time to deliberate and to determine the full extent of the requirements under the grant. It made no provision for continuing the services after the expiration of its own life. It seemingly understood that its life and the life of the grant were co-extensive and co-terminus, because its named purposes for which it obtained authority were simply to distribute current for lighting purposes, as we will see later. These acts of the grantee furnish what might reasonably be said to be conclusive of the length of time it was commonly understood the grant was to run and the purposes for which it was made. On this point the Circuit Court of Appeals aptly observed (pp. 271-274, record):

> "At the time this ordinance was passed, the Electric Light Company, referred to therein, had not been incorporated. It was, however, understood that it should be and it subsequently was incorporated pursuant to that understanding for a term of twenty years, to expire September 26, 1905. The company, being then an incorporated body of limited life tenure, accepted the ordinance as passed, and thereby entered into contract relations with the city. * * *
>
> "The complainant claimed that because its grant from the city was absolute in form, containing no limitation upon its duration, it constituted a grant in perpetuity entitling it and its successors or assigns to use the streets forever for the distribution of electric current. The city claimed (1) that it was without power to grant a perpetual franchise, and (2) that, if it had the power, it did not exercise it, but, at best, con-

ferred upon the company a license to occupy its streets revocable at the will of the city, at least, after the expiration of the corporate life of the company. * * *

"Undoubtedly the ordinance granted to the company either (1) a franchise to use the streets of the city perpetually, (2) a franchise to use them for a reasonable term, the same to be determined in view of all the facts and circumstances; or (3) a license revocable at the will of the city at any time. Which of these is correct? The city contends it cannot be construed as a perpetual franchise because that would violate the prohibition of Article 1 of the constitution of Nebraska, which provides that 'no * * * law * * * making any irrevocable grant of special privileges or immunities * * * shall be passed.' The company contends that the grant of a perpetual franchise which confers no exclusive right to the grantee is not the grant of a special privilege or immunity within the meaning of the constitution. * * * This contention of the company might be conceded, and the question would not be settled. The legislature of the state which primarily had the authority to grant the use of the streets for other than ordinary purposes of travel could have exercised its authority by direct legislation or through the instrumentality of the city in which the streets were situated." * * *

"The mayor and council, therefore, in making the contract evidenced by ordinance 826, were exercising a delegated authority."

Here follows a quotation of the statutory provisions heretofore in this brief set out, and also a discussion of matters not specifically pertinent to the point under view, then follows:

"The ordinance actually reserved to the city the right to require the removal of the poles and wires from the streets within sixty days after

the city council should declare the necessity therefor by ordinance. And this is not only inconsistent with, but it seems quite repugnant to the claim of perpetuity now made by the company. * * * In view of the foregoing, disclosing that no perpetual franchise was intended and pointing to the improbability of the company embarking upon the business without some assurance of extended enjoyment, we think the fact that the corporate life of the company continued for a period of twenty years affords a key to the true intention of the parties." * * *

Then follows citation of authorities on this point:

"We think the facts of this case in the light of the foregoing authorities discloses the intention that the company should have and enjoy the franchise in question, at least for the period of its corporate existence and that its assigns or successors might thereafter hold and enjoy the same at the will of the city only."

"This conclusion reconciles many, if not all of the apparent inconsistencies of the situation, and is not in disharmony with the principles declared in *Detroit vs. Detroit Citizens' Street Railway Co.*, 184 U. S. 368-395; 22 Supreme Court 410, 42 L. Ed. 592, and *State ex rel City of St. Louis vs. Laclede Gas Light Co.*, 122 Mo. 472, 14 S. W. 974, 22 Am. St. Rep. 789, that a corporation whose corporate existence was limited to a term of years could accept a grant or make a contract extending beyond the limit of its corporate life. The question here is not whether a lawful contract could be made for a term extending beyond the corporate life of the company, but relates to the probative force which limited life tenure among other facts and circumstances, has in construing a contract of uncertain and ambiguous character like that under consideration."

"It follows that the Electric Light and Power Company at the time of the threatened removal of its equipment by the city was occupying the streets as a license at the will of the city."

It is said on page ——— of appellant's brief that the Circuit Court of Appeals cited, in support of its position, cases which were not authority upon the points determined. Among the cases cited are those of *Turnpike Co. vs. Illinois,* 96 U. S. 63; *Blair vs. Chicago,* 201 U. S. 400.

In *Turnpike Co. vs. Illinois,* supra, it is said:

> "No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or invoking it on the part of the state. It cannot be presumed that it was intended to be a perpetual grant; for the company itself had a limited period of existence. At common law a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. * * * Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public."

In *Blair vs. Chicago,* supra, it is said at p. 481:

> "In the west side system the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to confer the right in perpetuity to the occupancy of the streets. * * * We think in such case that the terms granted would not extend beyond the life of the corporation conferring them where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to make a grant in perpetuity."

The cases of *Wyandotte Electric Light Co. vs the City of Wyandotte,* 126 Mich. 43, 82 N. W. 821; *City of Rock Island vs. Central Union Tel. Co.,* 133 Ill. App. 248; *Virginia Canon Toll Road Co. vs People,* 22 Colo. 429, 45

Pa. 398, 37 L. R. A. 711, and *City of St. Louis vs Laclede Gas Co,* supra, were likewise cited by the Circuit Court of Appeals. These cases counsel either overlooks, in any event does not attempt to criticize them.

In *Wyandotte Electric Light Co. vs. City of Wyandotte,* supra, the court says:

> "If a railroad company were organized for a period of thirty years, and a party, natural or corporate should grant it a right of way without specifying the time of user, the grant would be for the life time of the corporation. The law would imply that both parties contracted with reference to its period of existence."

In *Rock Island vs. Central Union Tel. Co.,* supra, the court said:

> "The ordinance of 1882 did not limit the period during which appellee could maintain its poles and wires upon the street. That did not make the ordinance a grant in perpetuity. * * * A grant to a corporation aggregate, unlimited as to the duration of its existence, without words of perpetuity being annexed to the grant only creates an estate for the life of the corporation."

In *Virginia Canon Toll Road Co. vs. People,* supra, it is said:

> "Its no answer to this proposition to say that the corporation is deprived of that which is valuable, for the corporation is deprived only of that which, by implication it agreed to relinquish upon the termination of its corporate existence. If the rule were otherwise, the result would be that a toll road company, which under our statute is limited to twenty years, might indefinitely prolong its existence and perpetuate its franchises."

To the cases cited by the Circuit Court of Appeals might be added the following:

People ex rel vs. Central Union Tel. Co., 232 Ill. 260.
People vs. Chicago Tel. Co., 220 Ill. 238.
Snell vs. Chicago, 133 Ill. 413.
Venner vs. Chicago City Railway Co., 236 Ill. 349.
Telephone Co. vs. Telephone Co., 118 Ky. 277.
Louisville Trust Co. vs. Cincinnati, 76 Fed. 296.
Lake Roland Elevated R. Co. vs. Baltimore, 76 Md. 332.

It was expected that counsel would cite the recent case of *Louisville vs. Cumberland Telephone and Telegraph Co.*, 32 Sup. Ct. 572. When this case first appeared, we were apprehensive that it might be used as an authority against us. Closer analysis, however, of the issues in that case and the points decided, and the reasons given by Judge Lamar, in the opinion convince that the case is in our favor rather than against us.

It will be noted that the legislature had given the telephone company a perpetual franchise to be, and had authorized it to erect its poles, string its wires and operate and maintain its system in the streets of Louisville upon the condition that it obtain the consent of the city to do so. In the manner provided by law the city gave its consent, without imposing conditions or limitations. The statutes of the state did not provide for a withdrawal of the consent so given nor did the terms of the consent so provide. The company thereupon constructed an extensive plant and system and entered upon its operation. Some time following this, the city undertook to recall the consent previously given, by repealing the ordinance giving the consent. The perpetual franchise to be, given to the company by the legislature of the state authorized it for all time to construct, oper-

ate and maintain in Louisville its plant and expressly empowered it to mortgage and pledge the same, and exacted of it the perpetual performance of the services undertaken. Judge Lamar observed in the opinion that without the right to use the streets, and this could be had under the terms of the grant only from the city, the rights granted by the state and the property devoted to the service, and all interest therewith connected would become valueless; and that under such circumstances to permit the city to withdraw the consent, without either statutory authority for that purpose or without authority having been reserved in the consent would in effect be allowing the city to destroy and render of no effect the franchise to be from the state, inasmuch as the franchise to be had been given by the legislature to the company to operate its plant in that particular city.

Some of the cases urged upon the attention of the court of appeals were urged upon the attention of the court, in this particular case. Judge Lamar in the opinion met this contention and distinguished the case at bar from the cases urged upon the court's attention in the following terms:

> "5. The appellant makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void ab initio, or revocable at the will of the general council." * * *
>
> "In support of this proposition numerous decisions are cited. In some of which it appeared that the state had chartered a public utiltity corporation, but the city, by ordinance, had given an exclusive or perpetual grant of a street franchise which was held to be void, because made in excess of the statutory power possessed by the municipality. In others, the company had been incorporated for thirty years, and the

> street right was held to have been granted only for that limited period. In others, it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the tracks and rails were laid."
> * * *

Citing many of the cases above cited.

> "None of these cases are applicable to a case like the present, where the Ohio Valley Telephone Co., with a perpetual charter, has received, not from the municipality, but from the State of Kentucky, the grant of an assignable right to use the streets of the city, which remains the same legal entity. * * * This grant was not at the will, nor for years, nor for the life of the city. Nor was it made terminable upon the happening of a future event, but it was necessary and an integral part of the other franchise conferred upon the company, all of which were perpetual, and none of which could be exercised without this essential right to use the streets."

Instead of the cases hereinbefore cited on this aspect of the controversy being discredited or overruled, or otherwise impaired, they are distinctly recognized as announcing the correct rule under the particular state of facts and are equally distinctly distinguished from the facts presented in that particular case, which facts, are in no wise like or analogous to the facts presented by the record in this case.

The case of *People vs. O'Brien,* 111 N. Y. 1, 7 Am. St. Rep———, is cited and extensively quoted from in appellants' brief as a case in point and controlling on the question of the right of cities to grant perpetual franchises, where no reservation appears in the grant, in the statute or in the fundamental law. It seems sufficient to say of this case, that the franchise in question was ob-

tained as a matter of barter and sale ,at public auction and knocked down to the highest bidder. This was permitted by the statutes of that state. These facts distinctly appear from the opinion. There can be probably no question but what under such permissable or authorized conditions a grant would be perpetual. Wherever this case is cited in various decisions on the question of the right of municipal authorities to make perpetual grants, its application is always distinguished on the specific grounds that the franchise obtained by the company in that case was bought, paid for and delivered as any other ordinary chattel. *Roland Elevated R. Co. vs. Baltimore,* 77 Md. 302; Thompson Corps, Sec. 5415, note 2.

We are not undertaking to make a claim that a corporation with limited life tenure might not buy either personal property and hold it, as any other owner would hold it, or take title to real estate and hold it in like manner, beyond the authorized existence of the corporation. That is not the question. The question at bar is best expressed by the following quotation from the Circuit Court of Appeals:

> "The question here is not whether a lawful contract could be made for a term extending beyond the corporate life of the company, but relates to the probative force which limited life tenure among other facts and circumstances has in construing a contract of uncertain and ambiguous character like that under consideration."

Applying the same principle of law, the rule is held to be that, when a corporation aggregate has a perpetual existence, a municipal grant of street privileges to it without a time limit expressed in the grant and where authority exists in the granting body to give a perpetual grant, the presumption of a perpetual grant will arise.

Louisville Trust Co. vs. Cincinnatti, 76 Fed. 296. In this case Judge Lurton is very careful to limit and confine the effect of the decision to a company having perpetual existence.

The Reservation in the Grant in Question is Significant and Should be Given Controlling Importance Against the Claim of a Perpetual Grant.

The reservation appears in the form of a proviso (pp. 3 and 4, record), as follows:

> "And provided further, that whenever the city council shall, by ordinance, declare the necessity of removing from the public streets and alleys of the City of Omaha the telegraph, telephone or electric poles or wires thereon so constructed, or existing, said company shall, within sixty days from the passage of such ordinance remove all poles and wires from such streets and alleys by it constructed, used or operated."

The Circuit Court of Appeals said that this reservation was inconsistent and repugnant to the claim of perpetuity. This assertion was made simply upon the strength of the provision as it appeared in the ordinance. It has a history and the history reinforces the idea of inconsistency and repugnancy to the claim of perpetuity. We introduced that history and it is found on pages 285-286, record. The ordinance had been introduced and twice read and referred to a committee without the above proviso. Thereupon the committee reported recommending the insertion of the above proviso into the ordinance, which was finally done before its passage. Its introduction was for one purpose and for one purpose only, and that was to enable the city to terminate the rights under

the grant in the manner of the proviso. Had not this proviso been amended into the ordinance, who is to say that some definite time limit would not have been inserted into the ordinance. It is all sufficient, when connected with its history, to show indisputably that the city was not willing to and did not intend to make a perpetual grant.

It is of no apparent consequence that the proviso mentions telegraph or telephone wires, because such mention was the expression only of abundant precaution, not knowing at the time just what wires the grantee might construct. The various cases cited by counsel on this phase of the controversy appear not to be in point because of the lack of similarity of questions presented and, for the further reason that the proviso above set out and its history are urged here simply as part of the probative facts marshaled and defiantly facing the contention that the grant in question was in fact and was intended to be a perpetual one.

Such reservations have been and will be enforced by the court. *Southern Bell Telephone and Telegraph Co. vs. City of Richmond,* 44 C. C. A. 147, aptly illustrates this. Sec. 5 of the ordinance there in question provided as follows:

> "This ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

Discussing the conditions of the grant at p. 154, it is said:

> "These conditions were accepted by the Telephone Company in the most direct and satisfactory way. The company acted upon them, and under the ordinance constructed, maintained and oper-

ated its line. * * * Under the act of the general assembly, the council could consent or refuse. It states to the company the terms on which it will give its consent. These terms were accepted by the company, and the ordinance discloses the contract between them. If the terms were distasteful to the company, it could have refused them, or, at least, protested against them. It is contended that under the act of the legislature of the city council could give only a categorical answer to the request for its consent, 'Yes' or 'No,' without terms or conditions. But as the act itself expressed no regulations to be observed by a telegraph or telephone company in its use of the streets or alleys of a municipality, although it had done this as to the use of county and state roads, etc., clearly in referring such a company to a council, it was intended that the council could state the proper measures for protecting the streets, alleys and the public. Especially is this so when the consent must be obtained, not only to construct, but to maintain and operate the lines. Again, it is contended that under the provisions of the act of assembly the city council of Richmond had authority only to consent or refuse permission to the Southern Bell Telephone and Telegraph Company to construct, maintain and operate its line in that city, and that such consent or refusal must have been given without any qualification or condition, whatever. It must have been a catagorical 'Yes' or 'No.' But the city council did in fact express conditions and qualifications in giving its consent. It may safely be assumed that, without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent."

In *Hamilton Gas Light and Coke Company vs. City of Hamilton*, 13 Sup. Ct. 90, there was a reservation in the constitution permitting an alteration or repeal of every charter granted. It was held that such reservation

became a part of every grant. That grants susceptable of two constructions that construction would be adopted by the court most favorable to the public.

Stem vs. Brenville Water Supply Company, 11 Sup. Ct. 882.

Bridge Company vs. U. S., 105 U. S. 470.

V.

ORDINANCE 826 DID NOT AUTHORIZE THE GRANTEE, OR ITS ASSIGNS TO DISTRIBUTE CURRENT FOR POWER, HEAT OR OTHER LIKE PURPOSES.

The purpose authorized by this ordinance is embodied in the following expression: "for the purpose of transacting a general electric light business." It is said in appellant's brief that this expression is comprehensive rather than restrictive. If this be granted, apparently nothing unusual has been established, unless it is meant by the term "comprehensive" the inclusion of every possibility of creative imagination. It is said that the "plain purpose of this phrase was to grant the right of way for all the uses and purposes within the functions known as electric light business." Then follows several pages of the brief devoted to an attempt to establish this assertion as falling within the "plain purpose" of the language. If there is a function known to the electric light business, other than electric lighting, it has not been made to appear.

The term "light" is the significant term in the above phrase. We were not aware that this term had ever become so wedded to the terms "power" and "heat" as to make them all one and the same thing in meaning

and signification, and so as to deny to the term "light" its separate estate and signification. The word "electric" preceding the word "light," in the above phrase is used simply to designate or limit the particular kind of light from other kinds of lights. Light meant in 1884 and means now just what the term says, nothing less, nothing more. "Electric" meant in 1884 and means now just what it says, nothing less, nothing more. "Electric light business" meant in 1884, distribution of electric current in the production of electric lighting, it means that now, and never meant anything else. The word "business" in that connection, meant then, means now, nothing less and nothing more than the investment in and employment of machinery, generating apparatus and wires in distributing electric current to produce lights.

This must be exactly and literally true when contained in an express and explicit grant of authority from a municipal legislature to a business concern, to authorize and enable it to occupy the streets for a particular and named purpose. It might not be exactly and literally true of a business conducted under the name and title "electric light business." Under that name, and in that connection such term might be said to be comprehensive rather than restrictive. The terms might be employed in a general way, simply to designate the general character of the business proposed to be carried on. For instance, a corporation might adopt such name for its business, and at the same time appropriately and abundantly provide for power and authority to distribute electric current to be employed in all kinds of service for which it might be proper. So likewise, a business carried on by individuals or unincorporated concerns might be designated under such general terms, without such terms imposing exact and specific limitations upon the activities

of the business carried on. But be that as it may, as to these things, an entirely different rule must prevail as to the terms under which a grant of authority has been made by a municipal body, here the rules of strict construction prevail in favor of the public and against the adventurer. Nothing passes by implication, unless indispensably necessary to the full exercise of granted powers. What the sovereign hasn't granted in explicit terms it has withheld. It has chosen the terms of its grant, the grantee has accepted them and nothing else passes.

Whatever may have been done by companies designating themselves electric light companies, as to the distribution and employment of electric current, furnishes no aid or assistance in the solution of this problem, except in those cases only where such companies have been limited in their activities by the terms of a grant authorizing the conduct of the business. No instance of this kind seems to be called to the court's attention by appellant's brief.

We believe there is no uncertainty or ambiguity in the language of this grant respecting the business that the grantee was authorized to carry on under the grant. There is nothing open or remaining for construction. The language of the grant in this respect seems its own best expositor of its meaning. In and of itself, it is doubtful if terms could be made more exact and specific, without the use of negative terms or expressions, this ought never to be necessary to limit or protect a public grant. To limit the language of this grant with more exactness than the self imposed restrictions of the positive terms thereof, would require the employment of terms making express exception of "power" and "heat," etc., as applied to the instant case.

The Circuit Court for the District of Nebraska, (record, p. 267), on this point aptly observes:

> "I cannot think that, in granting in 1884 the right to transmit electricity through the streets and alleys of the city for general electric lighting purposes, it was in the mind of the city council or any of the parties, or that they for a moment contemplated or intended, that the ordinance in question granted the right to transmit an electric current for all purposes and uses to which the inventive mind might in the future apply it, even though such new uses might be equally beneficial to the public. Had such been the intention, the word 'light' would have been omitted. The words 'a general electric light business,' as used in the ordinance, show clearly an intention to limit the use to which the electric current was to be applied."

If authority to distribute power and heat had been desired, had been intended by both parties to the grant, fitting language would have been employed for this purpose. The indisputable fact that its use for these purposes was practically unknown at the time, the other fact that no fitting terms were used in the grant, and the additional and further fact that the company in incorporating did not procure authority to distribute current for any such purpose are measurably near conclusive upon this controverted question.

Evidence of "The State of the Art," at the time.

Appellant has made a prolonged effort to show what is claimed to be "The State of The Art," at the time of the grant. Apropos, this aspect, it should be observed that this evidence is offered in lieu of better evidence. It is of about as remote character of evidence as might

be obtained. It is doubtless offered to support the claimed inference that at the time of the grant the use of electric current for producing power and heat was rather extensively known and appreciated, and that, therefore, the city council of the city of Omaha must have been so informed and had in mind, when making the grant, a purpose to give to the grantee the authority to distribute electric current for all known useful purposes. Of course, it goes without saying that if the individuals who were then councilmen of the city were alive and could be called to testify, then their testimony on this point and as to the fact, whether or not they knew anything about the employment of current for power purposes or had in mind a purpose to grant the right to distribute current for power and heat, would be far the more preferable and dependable. The proof on the so-called "State of the Art" is offered as a substitute necessarily for such testimony, and, of course, cannot and does not arise to the same point of certainty and accuracy. It so happened that two of the individuals who were then councilmen were alive and were called by the city to the witness stand to testify on these particular points, and their testimony will be, in part, called to the court's attention later on.

Counsel has called the court's attention to a somewhat extended review of the testimony of William J. Hammer, Thomas A. Edison, A. J. DeCamp, and the compilation of contemporaneous general literature made under the direction of William J. Jenks. Much is said of the entertaining and instructive character of this testimony. As an abstract proposition and unrelated to any issuable fact in this case, we quite agree. Mr. Hammer, it would appear from his own admission, had devoted much time and attention to preparing himself for this deposition. In a general way it may be said of his testimony

that it showed that electric lighting was comparatively well known and in much demand from 1880 on. That experiments and employment of apparatus, in an extremely limited and rather crude way during the eighties gave some promises and encouraged hope that electric current might be commercially and profitably employed in the production of power and heat. That interested concerns and persons, during a considerable portion of this time had taken some steps, from time to time, to benefit themselves by such possible development. For instance, he testified that when the electric lighting plant was first established in the city of New York, in 1881, or thereabout, some provisions and calculations were made to take care of possible developments of the use of current for power and heat. On pages 155-156 of the record, Mr. Elick Holme furnished a list of the power users of that company in 1884, in the city of New York with dates of installation, and at that time, in the whole city of New York there were but twenty-four users of current for power and these mostly users of motor fans and small apparatus of like character.

It is said that Hammer's testimony shows that the first system of electric lighting ever installed, being the one at Menlo Park in 1880-81, embraced as its function, the generation and distribution of current for power purposes. We do not understand that the Menlo Park exposition, for that is all it was, was intended to be an electric lighting system. It was understood that it was an installation intended to demonstrate the established use of electricity as well as its prospective use. And that, so far as the translation of electrical energy into power manifestations was concerned, it had been established no further than to give certain significant hints of its useful possibility. Therefore, Mr. Hammer's testimony is useful in two respects: first, in showing that

from the time of the development of central energy plants until the latter part of the eighties, electric lighting was a fairly well established business; and, second, that in this interim experiment and invention had done much to encourage the hope of practically and commercially developing power by means of electric current. The very fact that large expositions were being held in this and other countries from 1880 to 1884 is significant in itself and persuasive that the public generally had little acquaintance with the commercial and practical use of electricity even for lighting purposes and that those expositions were held for the very purpose of familiarizing the public with such practical and established uses, so as to make a larger market for such commodity.

It is true Mr. Hamemr testifies that at the exposition held under the auspices of the Franklin Institute in the fall of 1884, at Philadelphia, that many of the lighting systems had exhibts there and that current was used to drive machinery. It is equally true that these were all demonstrations. In that immediate connection, Prof. Wm. D. Marks, who, by the way, had charge of that exposition, testifying for the city said that he was superintendent of the exposition. That all exhibits were installed under his direction. That he was present at the exposition during every hour that it was open. That there was but one exhibit, that of Charles J. Sprague, in which a miniature series of fans were operated by small motors to show that electricity could be used for that purpose. That use of electric current for power purposes was a novelty to everybody at that time. That its manifestations in that respect was a constant source of amusement to visitors. (Record, pp. 457).

Mr. A. J. DeCamp, testifying for the appellant, (Record, p. 177-78) testified that in 1884 the Brush system at Philadelphia had in use thirty-two motors and

these were at the business places of John Wanamaker and Wanamaker and Brown's. In other respects, his testimony did not enlarge the field beyond that covered by Mr. Hammer.

Thomas A. Edison likewise testified for appellant. He testified that the system which he developed in 1880 was known as the "Edison System of Electric Lighting," and that that system embraced appliances designed to utilize electric energy for power purposes as well as lighting purposes. That his patents covered appliances for distributing and utilizing energy for light and power purposes. That local companies were organized and chartered by the parent concern to distribute current for all known purposes and that these local systems usually denominated themselves as Edison Electric Light Company, or Edison Illuminating Company, with the name of the town added. An examination of the license and charter from the parent company to its offspring discloses that the parent expressly chartered the local company with authority to distribute current for light, power and heat purposes. (Complainant's Exhibit A. J. W. M., p. 197, record).

As we have heretofore stated, the functions which might be performed under any general name which an inventor or a company might adopt as being generally descriptive of its business is not even suggestive, much less persuasive of the rule to be adopted in construing a grant which expressly names the purpose for which authority is given. This comment applies in its full extent to that part of Mr. Edison's testimony relating to the "Edison System of Electric Lighting," and local systems thereunder embracing as a part of the functions thereof, the distribution of current for power purposes. Under this general description, there is no apparent reason, other than possibly business ones, why individ-

uals or corporations, if the articles of incorporation so permit, could not carry on a street railway business, a lamp manufacturing business, or so far as the name is concerned, could not engage solely in mining business. Certain it is that if a public grant had been made to an individual or corporation to operate a system of electric lighting, authority would not be conferred under such terms to engage in mining or to operate a street railway. Yet, if appellant's contentions are good, then this very thing could be done and would be authorized.

Mr. William J. Jenks seems to have been industrious and to have accumulated considerable literature, from various sources respecting the development of electricity and the appliances for its use, along in the early eighties. The apparent purpose of this deposition was to show a widespread knowledge of the many uses to which electric current had been put about that time. This very fact of itself is abundantly sufficient to show that this art or science was in its infancy. That claims, some doubtless extravagant, some probably not, were being made of its manifestations and possibilities. That predictions were being made as to its possibilities. Most of these many predictions and prophecies have largely since come true and are common place and excite no attention. It is quite likely that those interested in a scientific or in a commercial way with the future prospects and possibilities of electricity kept track of the literature on that subject. But as to the ordinary layman, such as usually constitute city councils, it is not even probable that they kept track of such things. When called upon to legislate, they would doubtless be willing to legislate with reference to things well known and unwilling to legislate with reference to things wholly unknown or little understood, and concerning which no demand had arisen or seemed to exist.

As we have said, this line of testimony offers little more than possibilities, and can be of importance and consequence only when it is necessary to substitute speculation and conjecture, for certainty. The city called to the stand Charles D. Woodworth and Ed Leeder, two of the surviving of the city council making the grant in question. Mr. Woodworth testified that at the time the grant in question was made he knew only of the use of electric current in the production of light. That he knew nothing about any power production (p. 216-217, record). That in 1884 the witness had never seen any application of electric current to the production of power or any device or apparatus designed for that use. (p. 217-218, record). That he remembered no conversation or discussion before the city council with respect to the use of electric current for power purposes. (p. 219, record).

Ed Leeder testified that he remembered the circumstances of the grant. That he remembered the object and purpose of the franchise. That it was for lighting the city. (p. 277, record). That he thinks no other purpose was contemplated. That he understood the purpose of the grant was to enable the company to distribute current for light only, for lighting purposes. (p. 278, record). That the use of current for power had not been properly materialized so as to say whether or not it would be a success, "that it was a new baby born." Asked if he were at that time conversant with the possibilities of electricity for power or heat, the witness said: "Oh, no! Nor anybody else was at that time, nor anyone else." (p. 279, record). That to secure lights was the only thing talked about when the ordinance was pending. Asked if he knew how long the grant was to run, the witness answered: "I forget how many years, but it was a limited number of years; it was limited to some years, whether it was ten or twenty, I forgot."

(record, p. 280). Asked concerning his acquaintance with electricity and with the literature of the time the witness answered:

"A. Well, I will tell you the first experiment that Houston and Thompson made was on the corner of 14th and Douglas streets."

"Q. Do you remember when that was?"

"A. No, I could not say. But it was a little before that or a little after the franchise had been granted when they asked the council to go there. They had a great big arc light and people came there for miles around to see the first electric spark touched off on 14th and Douglas streets. I remember that because it was between me and Henry Hornberger's place. I had a saloon there and Hornberger had one on the other side, and they put it on the crossing of the street and turned on the power to see what lighting power it would have, and I remember that it concentrated all the bugs of the state of Nebraska—the light did."

The witness testified that he knew nothing of the use of current for power purposes until quite a number of years after the grant.

It seems that the testimony of these witnesses on the question of the purpose of the grant, upon the duration of its time and upon the state of the art, or the extent to which it was known among the people generally that electric current might be practically used for power purposes, ought to be far more controlling, far more satisfactory and far more dependable than any claim or series of claims which might be made concerning necessarily uncertain and doubtful conditions as described by the witness, Hammer and other like witnesses. There is no reason why these witnesses should not be believed. They have no interest in the result of this litigation, so far as we know, and apparently have no reason for stat-

ing the facts differently from what they recollect them to have been.

It is remarkable, too, that the parties litigant, on the same side of this particular question, but in different actions, have not been able to get together on a common understanding of the "State of the Art." In the case of *Omaha Electric Light and Power Company vs. the City of Omaha,* a diametrically opposite view, as to the "State of the Art," is taken to that advanced by the appellant herein; and low and behold! It was contended in that case that because the utilization of electric current for power purposes was practically unknown, it was therefore included within the terms fixing the purpose in the grant. Herein the opposite view is contended for. A Coon Trap, indeed! "Catch 'em goin' or comin.'"

We have introduced into this record some of the testimony introduced in the case referred to. Henry A. Holdrege, now and then the general manager of the company, and testifying for the company in that case, testified that he was an electric engineer by profession. That he was well acquainted with the history of the development and practical adaptation of current to the production of light, heat and power for the operation of machinery, and said:

> "The application of electric power to stationary machinery was not much understood or developed in 1884 and for several years thereafter. * * * (p. 241-2, record).

William F. White, a witness for the company and a graduate electrical engineer in 1887, testified that he had practiced his profession since said time. That he was vice president of the company in question, and, for many years was in active management of the business of the company. That he was well acquainted with the his-

tory of the development and practical adaptation of current to the production of light, heat and power, and he further says:

> "The application of electric energy to stationary machinery was not much understood or developed in 1884 and for several years thereafter; but new inventions and devices had been produced for the translation of energy to such extent that business of furnishing electric current has been very greatly developed and the use for the production of power and heat has become very important to the public as well as to the electric companies of the country. * * * (pp. 245-246, record).

Edward F. Schurig, a witness for the company, testified that he was an electric engineer by profession and that for many years was city electrician of Omaha, and says:

> "In the year 1884 the use of electric current had not been extensively and practically applied to mechanical devices, for translating its energy or force into power for the operation of machinery and was employed only in a small way and only where small power was required." (p. 238, record).

Waldemar Michaelson, city electrician of the city, and testifying for the city in said cause, testified that he was an electrical engineer by profession and had continued actively in his profession since his graduation in 1890, and says:

> "Affiant further states that in 1885 and 1886, electricity was not used for heat and power purposes to any considerable or practical extent and that its use for such purposes was not sufficient to render it a mercantile or commercial com-

modity for those purposes, and electricity was not then recognized by persons familiar with its use and possibilities as being practicable for heat and power purposes." (pp. 275 and 276, record).

Which of these sets of witnesses are correct, we confess we don't know. Both sets testified to qualifications ordinarily regarded as sufficient to authorize them to speak on such points. The conflict, however, does illustrate one significant fact, and that is that even among those best qualified to testify accurately, if acquracy was obtainable, there exists every contrariety of opinion as to "The State of the Art," at the time in question. If those whose business it was to know in fact didn't know, and this must be the enforced conclusion, then how may it be expected that ordinary laymen or individuals not interested in such subjects from either a scientific or commercial standpoint would know?

The City of Omaha has never placed a construction upon the grant in question, until the passage of the resolution in question; and has never practically construed the grant or interpretated it to mean or authorize the distribution of current to be used in the production of power and heat.

Such a claim is made by appellant, and some conduct on the part of the city is recited as showing such practical construction. There is no room for construction of the language embodying the granting purpose. It is not ambiguous, it is not uncertain. Any construction by either or both of the parties which would place upon the language used a meaning that the language gave authority to distribute current for power purposes, would not be binding upon either of the parties. It would be so inconsistent with and repugnant to the

language used as to be without weight or controlling importance. It is only where ambiguity or uncertainty exists that a construction may be called for and only in such instance where a practical construction apparently different from the language used, could have any importance.

The Circuit Court said:

> "The ordinance in question is not to my mind ambiguous, but plain and specific, limiting the grant to general electric light purposes." * * *

This court said in *Cleveland Electric Co. vs. the City of Cleveland,* 204 U. S. 116, 27 Sup. Ct. 202:

> "The rules of construction which have been adopted by courts in cases of public grants of this character by the authority of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, in order that the privileges may be intelligently granted or purposely withheld."

In *Charles River Bridge Co. vs. the Warren Bridge Co.,* 11 Peters 496, it is said:

> "The rule of construction in all such cases is now fully established to be this: That any ambiguity in the terms of the contract must operate against the adventurers; in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."

Further on in this same case it is said:

> "This was a fair case for an equitable construction

> of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors ,and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied ,because such a provision was not found in the charter. * * * It would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in the nature of monopolies, and confining corporations to the privilege plainly given to them in their charter, the courts of this country are enlarging these privileges by implication; and construing a statute most unfavorable to the public, and to the rights of the community, than would be done in a like case in an English court of justice."

In *People ex rel vs. Deeham,* 153, N. Y. 528, 47 N. E. Rep. 787, it is said:

> "The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. But the obvious intents of the parties, when expressed in plain language cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended should be avoided."

In *Citizens' Fire Insurance Co. vs. Doll,* 35 Md. 89, the court said (p. 107.):

> "As it was said by the Supreme Court, in the case of *Railroad Co. vs. Trimble,* 10 Wal. 367, where

there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it is entitled to great consideration; but where its meaning is clear, an erroneous construction of it by them will not control its effect."

In *Morris vs. Thomas,* 57 Ind. 317, it is said at page 322:

"There is no room, it seems to us, in the phraseology or verbiage of this clause, for construction or interpretation. It is plain, certain and free from ambiguity. It contains not a word or expression of doubtful or indefinite meaning. * * * But where, as in this case, the terms of the contract are plain, intelligible and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case, it is certainly not the province of the courts, by any rules of construction, to make another and entirely different contract for the parties from the one they made for themselves."

The practical construction of a contract by the parties is resorted to, not for the purpose of determining what that contract is in the light of the construction placed upon it by working it out in practice, but is for the purpose of determining what the contract was as made and when made. The practical construction by the parties is simply of the evidence as to what the contract was. It goes without saying that if the contract was without ambiguity and its language clear and express, then any practical construction violative of the language of the contract, would not be evidence as to what the contract was as made. This is the rule with reference to ordinary contracts. It is doubted if it is the rule as to grants from a municipality to a user of its streets, in the conduct of his business, though they may

be of a quasi public nature and for public purposes. In such case the rule of strict construction in favor of the public always obtains, a doubt in a grant which would require a construction of the parties, in actual practice, to determine its meaning, when and as made, would be such doubt as should defeat all claims arising from such uncertainty. A grant as worked out by the parties, might be entirely different from the grant as made, and if allowable, the municipal authorities might by such means invest a street user with powers and authority which the statute expressly forbids and which would not be tolerated if undertaken by express grant.

The grantee of this grant did not understand or believe that it had been given power and authority to distribute current and to maintain apparatus with which to furnish power and heat. Its own acts in preparing itself to perform the services under the grant ought to be well nigh conclusive on this point. The city introduced into the record the articles of incorporation of the grantee. (p. 28, record). Article 3 thereof sets forth the purposes which the grantee became authorized to carry on. In preparing a statement of the purposes, in order that it might perform them, it had in mind the authority which had been given to it by the grant and the duties required of it by the grant. Having these things in mind, this article provided:

> "The general nature of the business to be performed by said corporation shall be to purchase electric light patents, privileges, franchises and sell or otherwise dispose of the same; to construct lines of wires for the transmission of electric currents from central stations through such wires, or otherwise, to produce light for the illumination of streets, public and private buildings, and for all other purposes for which such light may be used; to enter into contracts for furnishing of

> such electric lights to cities, towns, corporations or individuals; and to furnish the same for the purposes aforesaid or for any and all lawful purposes anywhere within the state of Nebraska." * * *

The entire subject matter of this section, outside of dealings in fixtures and patents, relate to the production and distribution of current for light. Simply to engage in lighting business. No other article authorizes distribution of current for power purposes. This article but further buttresses our contention, that at that time profitable adaptation of electric current to power and heat purposes was little understood and practically unknown.

In addition to this, and on page 13 of the record, appellant has listed year by year the return or revenue from the sales of current for power. It has not listed any revenue derived from the sale of current for power prior to 1890. This again shows that the grantee had not even attempted, before that time to sell current for power purposes. The sales for the year 1890 and the years following, until 1893 did not amount to any considerable sum, but thereafter developed rapidly, conclusively showing that this phase of the venture had just begun, and, doubtless due to fortunate inventions, was developing with extreme rapidity. Therefore, the contention of appellant that the parties had put a practical construction upon the grant to the effect that the light company was authorized to distribute current for power purposes, by the terms of the grant, has no application to the intervening period of some six years between the date of the grant and the year 1890.

Appellants' own showing establishes the fact, so far as the record is concerned and probably so far as the actual truth is concerned, that the city did not legislate

or attempt even to regulate in any manner the distribution of current by the grantee until some time in 1892. This was something like two years after the light company had entered upon the active distribution of current for power purposes, according to its own showing. (p. 13, record.)

The light company had been assuming the right to distribute current for power purposes, at least for two years before the city even undertook its regulation, and had actively been carrying on the work of distributing current for this purpose. As to these two years, at least, the light company and the appellant ought not to be permitted to play the baby act and claim that it was induced to enter upon such venture by persuasive conduct from the city. There is no evidence in the record to show that the light company consulted the city as to whether or not it had the power by authority from it to distribute current for power purposes, at the time it entered upon such service or that the city had officially or otherwise advised it that it possessed such power. The company simply seems to have assumed such authority, and what's more, entered upon the service. Evidently in 1892 and the following years, when the regulatory ordinances were passed the city discovered the company performing this service and without actively investigating its right so to perform it under any grant, assumed the existence of such grant. The court judicially knows that city officials are not very diligent in the ascertainment of the limitations of the rights given franchised concerns and their activities under the grant, unless and until manifest abuses develop. This indifference is, or was so universal as to become a matter of general notoriety. The interests of the city officials in their duty to the public is less direct than the interest of franchised concerns seeking to bolster up or hedge

about doubtful and questionable claims of right and authority to exercise desired and profitable lines of activity. The negative conduct, therefore, of the officials ought not to be held as a practical interpretation of rights under the grant, to the detriment of the public.

But the regulatory ordinances cited by the appellant were general in their nature and applied to all concers which might be engaged in like business, and were intended only, and so understood to protect the welfare, property, safety and convenience of the public and the citizens of the city. These regulations would be equally imperative whether the business carried on was in fact authorized by a grant or was not authorized by a grant. The city could permit the light company, without any grant to enter upon the streets and continue to carry on such business, in which event, however, a duty to regulate its operation would be no less great.

These same observations are equally pertinent to the legislation by the city requiring the placing of the wires underground within certain named districts. The light company could have discontinued the furnishing of current for power and avoided the expense of going underground. The city manifestly could require a company operating at sufferance or at will to place its wires in underground conduits, if such was declared or determined to be in the interest of the welfare and safety of the community, or remove from the streets. The city found the distributing apparatus and wires in the streets, their existence there was a constant menace to the wellfare and safety of the community, and without reference to the question where or not the same had been placed there by franchised authority or without it, the requirements of protection were equally imperative; and the citys' conduct in providing such safety and requiring the doing of such things as were necessary to insure it,

should not be construed as a practical interpretation of the franchised right of any particular company in the streets. These same observations apply with equal force to the showing of the appellant that the city at different times and by contract exacted royalties from the company, covering, as well the revenues from power and heat sources. The so-called royalties were exacted as a condition or consideration for a street lighting contract. These exactions could as well be made from a company without a franchise as one with a franchise. The power could be purchased from a company without a franchise as well as one with a franchise. Suppose, for instance that the Elecric Light and Power Company had no franchise and there was no question about such fact, would it be contended for a minute that the conduct herein imputed to the city would be sufficient to sustain the claim of a franchise? Before a practical construction can be justly claimed, which amounts to a recognition or an interpretation on the part of the city of certain rights claimed by the opposite party, it ought to be shown in connection with the conduct claimed to establish such result, that such conduct was deliberately entered upon and pursued in the light of definite knowledge that the other party was making definite claims of certain rights which had been given to it by the city. The record presents no such situation. This is the rule announced by the Supreme Court in the cases cited by appellant:

State vs. Board of County Commissioners of Cass Co., 60 Nebr. 572.

School District vs. Estes, 13 Nebr. 52.

Hale vs. Sheehan, 52 Nebr. 184.

Though none of these cases called for the construction of a municipal grant. The same might be equally said of the other cases cited by appellant on this point.

If the grant in question was made in definite terms and limited to definite purposes and no ambiguity or doubt exists in this respect, then there is no room for construction or interpretation by the parties, and any practical interpretation, different from the language would be without weight or control. No petition of equities, however strong, should be sufficient to read into this grant powers not given or intended to be given by it. Such is the rule announced in *Water Light and Gas Co. vs. the City of Hutchinson*, 202, U. S. 385, 28 Sup. Ct. 135, wherein it is said:

> "And these conditions are imperative—too firm of authority to be disregarded upon the petition of equities, however strong."

Moreover, the claim that the services are useful and beneficial to the public ought not to avail the appellant, nor ought the claim that the public or power users would thereby be injured avail it. The public and these users are not parties to this suit, are not complaining, and presumably are satisfied.

Abbot Municipal Corporations at Sec. 907, says:

> "The rule of strict construction applies, as stated in a preceding section and where, therefore, a grant of the right to use the public highways for the purpose of supplying either water, light or power is not general in its terms, but describes in specific language the particular business which can be legally carried on by the grantee of the right, that grantee cannot lawfully engage in supplying another commodity resulting in the same benefit, or put the articles which it is authorized to supply for a designated purpose to another purpose; neither can the grantee of such a license or contract increase the number of commodities supplied by him though in a general way the business of furnishing them is sim-

ilar in character. The application of these rules forbids a company authorized to supply electric light from furnishing electric current for power though generated by the same plant and conveyed by the same wires or some of them. Neither can a company authorized to supply water or light alone engage in the business of supplying both water and light." * * *

Chicago General Street Railway Co. vs. Elliot, 88 Fed. 941.

Scranton Electric Light Co., 122 Pa. 154, 15 Atl. 464.

Subd. 24, Sec. 15.

The rule stated by Abbott, in the section last above quoted must be the correct rule, especially in the light of the strict construction in favor of the public, which is required in construing municipal grants. It distinctly recognizes that each of such service is necessarily a separate servitude upon the streets and public ways, for which a distinct grant is required. That the right to distribute current for power is a servitude distinct from the right to distribute current for light seems to admit of no serious debate. The mere fact that, in part, the same generating and the same distributing apparatus may be used is not the test of the separate character of the servitude; but rather the extent to which the streets might be required to be used and the extent to which they might be occupied by distributing apparatus in the performance of the service, seems the proper test to determine the question of whether or not the servitude is one or more.

This ought especially to be the rule adopted in respect to the instant case. Here, as we have seen, at the time of the grant in question, electric lighting was quite well understood and fairly well developed, as to its extent, at least, and as to the extent of the necessary employment of distributing apparatus in the performance

of the service, the city authorities with reasonable accuracy might well predetermine the extent to which the streets would be occupied with wire and other distributing apparatus in order to enable a full performance of the service for lighting purposes and might be willing, and in this case doubtless were willing, to allow the streets to be burdened with the servitude of distributing current for light. On the contrary, as we have seen, the distribution of current in the production of power and heat was practically unknown at that time. Its future development could not be easily anticipated, and the requirement of distributing apparatus and wires in the streets could not be approximated. Indeed, in the light of development to date, and these have been marvelous in the demands of current for power, even now it seems barely possible approximately to predetermine the extent to which the streets and public places might be burdened with apparatus to carry forward such service. Consequently, the fact that the language or phraseology of the grant did not expressly or explicitly confer upon the grantee such right, ought to be all sufficient to deny the company its claims in that respect. The city ought not by construction be made to do that which it apparently refused to do.

VI.

THE CITY OF OMAHA HAS NOT BY ANY OF ITS ACTS ESTOPPED ITSELF TO DENY TO THE COMPANY THE RIGHT TO DISTRIBUTE ELECTRIC CURRENT FOR POWER PURPOSES.

The appellant in its brief claims that the conduct on the part of the city, called to the court's attention in

an earlier part thereof, is such as to estopp the city from enforcing the provisions of the concurrent resolution. Some cases are cited from the Supreme Court of this state and it is claimed for them that, under like circumstances, the rule to be applied under the law as announced in this state, would estopp the city from questioning the company's right to continue the distribution of current for power purposes, at least, to the extent that such services were established at the time of the passage of the resolution.

Before noticing these cases and the rule of law announced by them, some observations with reference to the situation as actually presented in the record, seems pertinent.

As has previously been made to appear in this brief, the disclosed conduct which it is claimed estopps the city, was principally legislation by it, having for its purpose the securing of the safety of the public in the use of the streets and the welfare of the city generally. That such legislation would be required as imperatively, for the protection of the public, whether the light company had or did not have a franchise, or claimed or did not claim a franchise for the mentioned purposes. The city was dealing with conditions and not a theory. This company was occupying the streets with apparatus which was in its nature inevitably a menace to the welfare and safety of the travelling public. If the light company did not have a franchise to authorize the activities or all activities in which it was engaged, and about this there was no question, then certainly appellant would not claim that the city's acts in the respects instanced would operate as an estoppel or would amount to a grant to it authorizing such activities. It was bound to know the extent to which it had been granted such right, and as to all the things complained of, it was optional to the

company to discontinue the activities and to remove the obstructions from the streets which it had placed therein, if it did not care to chance the additional investments which might be required to conform such activities to the requirements of the city. It knew as much about the terms of the grant and the proper construction thereof as the city did. In passing this legislation and in forcing such regulations, there should not be imputed to the city a recognition of any particular rights in the streets or any inducement to the company to make further investments. There is, of course, the recognition of these facts, and that is as far as the recognition ought to be carried, that the company had established in the streets and was maintaining therein apparatus and wires engaged and employed in the distribution of current and that certain dangers to the public were constantly to be apprehended from such apparatus, and that these dangers should be minimized to the greatest possible extent. It might be said that these acts recognized the company as rightfully occupying the streets. If this were admitted the claims of the company would not be established, because if they were at sufferance or at will and with no grant whatever such occupancy might be rightful, so long as permitted. So far as the record is concerned, there is absolutely nothing to show that the light company claimed the grant to be perpetual. There is nothing to show that the city regarded it so. Therefore, in doing what the city did, as disclosed by the things recited, it wasn't done in the face of contentions or claims of rights in the streets for any given period of time or under the impression that such rights so continued.

We take it to be a rule of law so well established that controversy will not be made concerning it, that estoppel will never be held to supply the want of power.

That is to say, if the mayor and council were without power to give the grant in perpetuity, then estoppel can never be invoked to accomplish this purpose. If the acts on the part of the municipal authorities are ultra vires, in the strict sense of that term, then no acts of the city, whatever they may be, will be held to estopp it from questioning an unauthorized grant. If there is a decision of any court to the contrary, it has not been called to our attention.

The Circuit Court held that the acts of the city council here complained of were not sufficient to work an estoppel against the city, saying:

> "No representations or conduct upon the part of the city are shown which constitute an estoppel. Whether the ordinance granted authority to transmit electricity for other than lighting purposes was as well known to the complainant and its predecessors as to the city, and the essential elements to constitute estoppel are not shown. * * * The law, I think, fundamental, that a power required to be given by a city ordinance can only be modified or enlarged by ordinance."

Crary vs. Dye, 208 U. S. 515.

Apropos this same subject, it is to be remarked that such action on the part of the city as is complained of and claimed sufficient to work an estoppel, is what might be properly termed non-action, or negative conduct. So far as any right is given to grant a franchise or to enlarge or modify it, these things must be done in prescribed ways. Moreover, estoppel, like forfeiture, is not a favorite of the law, and for superior reasons. That the city should be held estopped to question a thing, the right to do which it could only give in prescribed manner seems nearly unthinkable and quite monstrous. That the

conduct of an official who has no power or authority to grant a right, might estopp the city from questioning the exercise of such act seems equally absurd.

Statements in the opinion in *Louisville Trust Co. vs. City of Cincinnatti,* 76 Fed. 269, 316, are quite to the point.

> "It has been urged that the expenditure of great sums of money necessary to change the motive power from horse to electricity, a change required under resolutions of the board of public works, * * * estopps the city from denying the rightful occupation of the streets by the company, and operates as an extension of the expired grants. * * * Under the statutory law of Ohio, no street franchise of such a company could have been granted, renewed or extended, at the date of the resolution passed by the Cincinnati board of public works, or that passed by its successor, the board of public affairs, except by an ordinance passed upon the recommendation of the board of public affairs. * * * The city was but a trustee, acting for the public in respect of the granting of street easements. The mode in which it might grant such street rights was specifically prescribed by law. It was not, therefore, competent for the board of public affairs to extend such an easement without the concurrent action of the legislative branch of the government, and the mere non-action of the municipal government after the expiration of a part of the street grants under which the company was occupying the streets neither creates an estoppel nor operates as an extension of grants, which could only be extended by the ordinance duly enacted."

City of Detroit vs. Detroit City Railroad Co. et al, 60 Fed. 161.

In *City of Mobile vs. Sullivan Timber Co.,* 129 Fed. 298, is to be found the following:

"Estoppels are not favored by law, and this would seem especially true when by such estoppel it is attempted by the omission or indifference of officials, to finally conclude the rights of the public to a public use." * * *

In *Philadelphia Mortgage and Trust Co. vs. City of Omaha,* 63 Nebr. 280, and at page 207 et seque, is to be found the following:

"The authorities are, we think, quite uniform in support of the proposition that the doctrine cannot ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third party to his detriment. * * * A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. * * * The doctrine is well settled that no laches can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even willfulness of any one of its officials."

Moreover, there is necessarily involved in the question of estoppel in pais an intention or purpose to deceive or mislead, or such negligence, on the part of the party to be estopped, as will justify the imputation of fraud to him.

In the case of *Brant vs. The Virginia Coal & Iron Co.,* 93 U. S. 326, it is said:

"It is difficult to see where the doctrine of equitable estoppel comes in. For the application of that doctrine, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence

> on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which, in effect, implies fraud. And, therefore, the circumstances of the case, repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject come to this result naturally, that there must be positive fraud or concealment or negligence so gross as to amount to constructive fraud,' 1 Story Eq., 391." • • •

In this case it is further said:

> "Where the estoppel relates to the title of real property, it is essential to the application of the doctrine, that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel."

This same rule is announced in the case of *Crary vs. Dye*, 208 U. S., 515.

Tested by this rule, the facts already shown in the record fall short of establishing an estoppel against the city, the estoppel invoked, in effect, is against the city asserting rights in and to its title privileges with reference to the use of its public streets and alleys. As we have said, the means available to the appellant or the Light Company to ascertain the correct meaning of the grant in question were as open to those parties as they

were to the city. The sources of information were just as available to the one as to the other. No act of the city is pointed out which shows an intent to defraud or deceive, or which was such negligence on its part as to amount to constructive fraud. The city owed no duty to the Light Company to instruct it of its rights under the language of the grant; indeed it was not in a position so to instruct it had it desired to do so, for the all-sufficient reason that the Light Company was as well or better posted upon the extent of its rights under this grant than the city was. Moreover, under the record, the Light Company had first assumed the right to distribute current for power purposes, and had entered upon this service, presumably construing the language of the grant sufficient for its authority so to do.

Therefore, it is begging the whole question for the Light Company, or appellant, now to contend that the acts of the city regulating the business assumed or undertaken by the Light Company, on its own election, was an inducement or caused it to make large outlays and investments, in reliance upon the conduct of the city; because the record discloses that the Light Company had assumed this right, and had entered upon the services, making the necessary outlays and investments to their performance. If the user of the streets of the municipality, such as the Light Company, in this case, desires to speculate and gamble upon the extent to which it might use those streets without being questioned, this is a chance which it must take, and the investment necessary to the undertaking is necessarily placed in the same position of uncertainty, and the party so gambling will not be heard to complain if his judgment has misled him to his injury.

In support of its contention with reference to the claim of estoppel, the cases of *State vs. Lincoln Street*

Ry Co., 80 Nebr., 333; *State ex rel etc. vs. the Citizens' Street Ry. Co.*, 80 Nebr., 357; and *Omaha & Council Bluffs Street Ry. Co. vs. the City of Omaha*, 90 Nebr., 6, are cited, and it is claimed for them that they announce the rule of estoppel prevailing in the State of Nebraska, which should be applied and which is all sufficient to protect the Light Company and the appellant in the claim made by appellant under the record in this case.

The first of these cases, *State vs. the Lincoln State Ry. Co.*, supra, involved the grant of permission by the electors to a Street Ry. Co., under a vote for that purpose.

The question submitted to the electors and that voted upon by them simply designated the ends of the streets, running in each direction, as the termini. The court held this insufficient under the requirement with reference to the designation of the termini. In the meantime, however, the company had laid tracks on a part of the streets. The city seems not to have questioned the right of the company to proceed with the construction and operation of its tracks under the authority given by the vote. In a subsequent proceeding, to oust the company from the streets, the city was held to be estopped, as to lines actually constructed, to oust the company.

In this particular case, the rule of estoppel was applied by the court upon the apparent theory that nothing more was required than the going upon the streets, the construction and operation of the lines without the slightest warrant or authority so to do. The apparent theory of the holding was so manifestly absurd, so unsupported by adjudicated cases, so illogical and tottering, that the court, or at least the judge writing the opinion, took steps to correct the patent errors, in the following case of *State ex. rel. vs. Citizens' Street Ry. Co.*, supra. This

case involved the same questions as the previous one and presented the same matters for decision. It was therein announced that where the electors possessed the power, if regularly executed, to make a grant to the Street Railway Company to use the streets of the city for street railway purposes; and that, if in the execution of the power so had, it was irregularly done, but not so irregularly as to deprive the attempt of all authority, and if the city authorities and the company to whom the grant was made, acting in good faith, assumed that the grant of authority was properly made, and thereunder made large investments and constructed a part of the lines and operated them for a considerable time, the authorities of the city would be estopped by this conduct from thereafter questioning the right of the company under the grant, to the extent that the roadway had been constructed thereunder.

So far as the principles of the right of estoppel, without reference to the facts of the particular case justifying it, are concerned, this is believed to be the announcement of the correct rule.

The facts of the two cases last above mentioned present different problems indeed from the facts under this record and demand an entirely different solution. In those two cases there existed unquestioned authority in the electors to make the grant, if this authority had been properly executed the company undertook to do the exact things, and only those things, which the grant undertook to authorize. There is no room for debate or discussion, as to the Street Railway cases, that the company did, or undertook to do, only the things which the electors undertook, by explicit and appropriate terms to authorize. Had the electors regularly exercised the powers conferred upon them, then no controversy could have possibly arisen. Not so in the instant case. Here the

grant, in terms and by appropriate language, had not only not conferred the power which the company undertook to exercise thereunder, but had expressly denied the exercise of such power.

In the Street Railway cases, above instanced, the company had assumed and so had the city, that the electors had, in the manner required by law, given the authority to the company in a lawful manner and which, without question, they could give. Acting under this, the company had made large investments, believing in good faith it had the right to do so, and the city had dealt with it and permitted it to make the investments, believing that the electors had, in the manner required by law, given the company the right to do that which it undertook to do. In the instant case the company was without right to believe that it was authorized to make any investment or venture any of its property in the distribution of current for power purposes. It did not so believe it. It did not make any investment so believing it. On the contrary, it knew that the grant was not broad enough to authorize such undertaking. It hoped, of course, to escape detection, and to continue the exploitation of the streets for such unauthorized purposes.

The city authorities did not believe that such powers had been granted the company. They knew that the company had been authorized by grant to distribute current for lighting purposes, and all the acts of the city with reference to the regulation of the company and dealing with it were with reference to this feature of its authority.

The cause of action involved in the *Omaha & Council Bluffs Street Ry. Co. vs. the City of Omaha*, supra, grew out of the passage and enforcement of the concurrent resolution here in question. In that case, certain power users were induced to intervene and set up, as against

the city, in the event that the city was successful in its contentions, claimed injuries which they might suffer. It is said to be decisive of this case, so far as the establishment of a principle or rule in another court might be decisive, of questions pending in this court.

The claims of the Street Ry. Co., in that litigation rested upon entirely different claims from those made by appellant or the Light Company in this litigation. The Street Ry. Co. claimed the right to distribute current as an incident of its rights in the streets to operate its railway system, and to furnish power to that end. This contention, however, did not seem to meet with much favor from the court. As to this contention only there are similarities in the claims made by the appellant and the Light Company in this case and the Street Ry. Co. in that. It was further claimed by the Street Ry. Co. that in 1866 it had received a franchise for fifty years; that the city had, from time to time, passed certain ordinances as early as 1882, and from that time on down to 1886, being (1) a grant to the Northwestern Electric Light & Power Co., (2) Ordinance No. 756, and (3) Ordinance No. 1031, which authorized any person, company or corporation to transmit electric current throughout the city, upon compliance with the provision of the ordinance; that certain definite regulations were prescribed; that, therefore, the Street Ry. Co. and its predecessors were thereby authorized to distribute current for power purposes; that they had been given a franchise to occupy the streets for street railway purposes and to distribute current for motive power to the system, and consequently were not trespassers upon the street; that they had complied with the provisions of the several ordinances above mentioned, authorizing *any* person, company or corporation to engage in the transmitting of electric current in compliance with such ordinances; that, during the time

these ordinances were in force in the city, the Street Railway Company and its predecessors in interest had undertaken the distribution of current for power purposes to various patrons, and had builded up a fairly large and profitable business in that respect, and had made large investments to that end. The court found these facts to be about as stated, and thereupon held the city estopped, during the life of its colorable franchise or rights in the street to question the rights of the company to continue the service as then established. The court was careful, however, not to extend the injunction beyond the life of the company, as shown by its claims, or colorable claims.

This situation, therefore, seems to have been established in that case; (1) that the Street Railway Company had some claim, which could not be questioned in that particular case, in and to the streets of the city, which had not expired; (2) that the city had, in the 80's, by ordinance, conferred upon *any* person, company or corporation the right, on compliance with the ordinance, and upon procuring the proper permit from the proper authorities, to transmit electric current throughout the city; (3) that the Street Railway Company, assuming that it had the right so to do, did comply with said ordinance, and procure the necessary permits to transmit and distribute current devoted to the production of power to certain patrons; and (4) that it thereafter continued to distribute current to be used in the production of power to its patrons, until the enactment of the resolution in question. Therefore, outside of the question of its power or authority from the state, which the city could not raise, it is apparent that this company had been authorized, by general grant from the city, to do the particular business which it was undertaking to do, and in order to carry on such business, it had made consider-

able investments from time to time in the necessary distributing apparatus and generating machinery. And the court held that it would be inequitable and unjust to the company, under such circumstances, to discontinue that service and destroy the property employed in it without compensating the company, at least, until the expiration of the grant to the company of the rights lawfully to be in and occupy the streets.

Again, it seems quite needless to point out, in different terms, the want of similarity between the instant case and the case last above mentioned. The Light Company makes no claims under any franchise or authority other than that given in and by Ordinance No. 826. It rests its entire claim under the extent of authority thereby given. It must stand or fall upon the language of that grant. The foregoing cases cited by the appellant are therefore authority simply on the question that in the state of Nebraska the rule of estoppel has been invoked against and made to apply to the conduct of municipalities. The want of similarity in the facts in these cases and the one at bar and the want of similarity of the principles to be applied dispose of the significance of these cases beyond the point above suggested.

VII.

THE APPELLANT IN THIS CASE IS CONCLUDED BY THE DECISION IN THE CASE BROUGHT BY THE OMAHA ELECTRIC LIGHT AND POWER COMPANY.

We feel that it has been made to appear, in the early part of our brief, that the relations existing between the Omaha Electric Light & Power Company and the appellant herein, and the obligations assumed by said Light

Company under the trust deed heretofore mentioned (page 76, et seq., record), are such that a suit by the Light Company, involving the questions that were there necessarily involved, will be held to be for the benefit and use, not only of the Light Company, but of the trustee and bond holders; that the trust deed was of such kind and character as to make it imperatively necessary, on the part of the Light Company, to bring the action in question and to test in the courts any claim or threat which might impair, or threaten to impair, the security, either by dismembering it or by depreciating its value; that said trust instrument and the provisions threof are such as to make the trustee and the bond holders in privity with the Light Company in any action by it in the courts, having for its purpose the protection of the security and the caring for the same. This obligation and duty to the trustee and bond holders was made a solemn covenant in the deed of trust, and was exacted of the company by the trustee and those whom it might represent, in their interest and on their behalf. (pp. 83-4, record; pp. 89 and 90, record).

While it is pleaded in the bill, in this case, that the Light Company, in the case which it brought, omitted to aver in its bill and to support by testimony.

> "Important facts essential to the proper determination of the rights which your orator, as trustee, as aforesaid, acquired from said Omaha Electric Light and Power Co., and still possesses, as herein shown, to the use of the streets, alleys and public places of the city of Omaha, were not set forth and brought to the attention of the court." * * * (p. 25, record);

yet it will be observed from an inspection of the bills in the two cases mentioned and from the testimony in the two records of the respective cases, that, outside of the

statement of the bill and the proof in that respect of the relation of trustee and mortgagor, nothing of an essential or important character is pleaded in this case which was not pleaded in the other case, and nothing in the proof, except as above stated, is brought into the record in this case which was not brought into the record in that case, beyond amplification and cumulative testimony of controverted questions appearing in both bills.

In other words, appellant, in this case, rests its right to relief on exactly the same grounds that the Light Company did in the case brought by it. Indeed and in fact, most of the averments of the bill in this case, most of the proofs and most of the arguments in the brief, questions or attempts to question the right of the city to interfere with the activities of the Light Company. This appellant simply attempts to step into the shoes of the Light Company after that company was forcibly extracted from them by the decision rendered in its case against the city of Omaha.

This being the situation, the case of *Keokuk & Western R. R. Co. vs. Missouri*, 152 U. S., 313-314, urged upon the attention of the court in appellant's brief, cannot be held to be in point or controlling. Nor can the case of *Louisville Trust Co. vs. the City of Cincinnati*, 76 Fed. 298-300, and cases therein cited, be said to be in point or controlling. Both of these cases or all of them were cases wherein it was undertaken to apply the rule of former adjudication, as against the mortgagor, to a mortgagee in his attempt to foreclose and realize upon the securities. The rule in such case ought to be different from the rule to be applied in this case; there is no attempt here to foreclose or to take possession of the mortgaged property. The Light Company was doing, in the institution and maintenance of its suit, just what the trustee and its bond holders had stipulated that it should

do on their behalf and for their protection. As to the controverted matters and claims, the interest of the bond holders and the trustee is identically the same as that of the Light Company. Why should there be two suits or two decisions with reference to absolutely the same facts, absolutely the same questions and absolutely the same rights. Under this same theory and at any time the individual bond holders may see fit so to do, they may bring separate suits, setting up the same questions that have been set up by the Light Company and by appellant. The trust deed is no more exacting in its requirements that the trustee should bring its action to protect the mortgaged property, for and on behalf of the bond holders, than is it in respect to the duty of the Light Company to bring and maintain the action for and on behalf of the trustee and those whom it represents.

The mortgagee took the franchise of the company evidenced by Ordinance 826, with all the infirmities and weaknesses it may have had in the hands of that company. If the grant were limited to twenty years, as declared by the Circuit Court of Appeals, and if it were further limited to the distribution of electric current to be applied only in the production of light, as held by the Circuit Court and as justified by the language employed in the grant, then these limitations upon it follow it into the hands of the mortgagee, and no larger rights were acquired by the mortgagee than were possessed by the Light Company. It would be a doctrine new in the law indeed if private contracts of the corporation, such a one as is evidenced by a mortgage, could force upon the grant a perpetuity of existence, and broaden the powers to be exercised thereunder, contrary to the grant as made, against the public policy of the state and in the face of the want of authority in the municipality to make such grant. This is, in effect, said to be the law in the

case of *Mumma vs. the Potomac Co.*, 8 Peters Rep., 281; *Chicago Life Insurance Co. vs. Needles*, 113 U. S., 574; 5 Sup. Ct. Rep., 681; and cited with approval in *New Orleans Water Co. vs. State of Louisiana*, 22 Sup. Ct. Rep., 691.

In *Duluth vs. Duluth Gas and Water Co.*, 45 Minn., 210, 47 N. W. Rep., 781, the Supreme Court of Minnesota says:

> "The council must be held, when dealing with it, to know its charter, its purpose and powers, as disclosed by its articles of incorporation."

This case is cited with approval in *Minneapolis vs. Minneapolis Street Ry. Co.*, 30 Sup. Rep. 118.

If such be the duties of the city council, when dealing with a corporation, the converse must be equally true, and the corporation and the mortgagee of its property must be held to know and to ascertain, at their peril, the extent of the authority given in any particular grant by the municipal authorities, and the mortgagee must be held to have contracted with reference to whatever restrictions and limitations may have existed in the grant. The language of this grant is now as it always has been. The mortgagee was bound at its peril to advise itself of the rights which the grant authorized and of the limitations which it imposed. The sources of information were open to it, and the city did nothing to interfere with a full investigation by the appellant of the rights under the grant in question. It was not misled or misdirected by any of the acts or representations, if any be shown, which the city may have made. The record shows that the appellant, before accepting the franchise in question as security for its bond holders, caused an investigation to be made of the legal import and business advantages of the grant. The mere fact that it was incorrectly ad-

vised as to the powers granted or duration of the grant is of no concern to the city, inasmuch as the city had nothing to do with the shaping or giving of such advice. These acts on its part but disclose clearly that it understood that it was taking the grant in question with all the infirmities in the hands of the mortgagor.

In the case of *Calder et al vs. the People of the State of Michigan,* 218 U. S., 591; 31 Sup. Ct. Rep., 122, it is said:

> "By making a contract or incurring a debt, the defendants, so far as they are concerned, could not get rid of the infirmity inherent in the corporation. They contracted subject, not paramount to the proviso for repeal, as is shown by a long line of cases."

The above was an action to reverse the holding of the state court, denying the plaintiff an injunction. The legislature had reserved in the grant to the company the right to repeal the grant. It was exercising this reservation. The city had given the corporation a franchise to lay pipes in its streets, and the company had mortgaged its property and franchise. It was contended by the company that in giving the mortgage as security, a security was given not limited or terminable by anything short of payment; that the attempt to extinguish the corporation, if successful, would render the security and accompanying franchise unavailable, and the act therefor void. The court said:

> "We express no opinion as to whether the premises of the foregoing argument are justified by anything appearing in the present record. In any event, the conclusion cannot be maintained. If the city gave the privilege of using the streets to the corporation forever, it could not enlarge the right of the corporation to continue in exist-

> ence as against the sovereign power. . . . . We may add that it is a matter upon which the bondholders have nothing to say."

When this same case was before the Michigan court, 115 Mich., 724; 117 N. W., 314; 126 Am. State Rep., 550, that court observed:

> "In this action, we considered the claim of respondents that the constitutional right of certain holders of bonds of the corporation are impaired by the repealing act. These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage, in any way, change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is, therefore, an entirely immaterial circumstance, and in no way effects the correctness of the foregoing reasoning."

Without undertaking a restatement of the points advanced in this brief, or even a resume thereof, we submit that the decree of the lower court was right, and should be, in all things, affirmed.

Respectfully submitted,

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